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BEFORE THE WASHINGTON

UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC.,)
Petitioner,)Docket UT-053036
)Volume II
)Pages 13 - 73
v.)
)
QWEST CORPORATION,)
Respondent.)

Oral argument in the above-entitled matter was held at 9:39 a.m. on Wednesday, August 3, 2005, at 1300 South Evergreen Park Drive, S.W., Olympia, Washington, before Administrative Law Judge KAREN CAILLE.

The parties present were as follows:

PAC-WEST TELECOMM, INC., by Gregory J. Kopta, Inc., Attorney At Law, Davis Wright Tremaine, LLP, 2600 Century Square, 1501 Fourth Avenue, Seattle, Washington 98101.

QWEST CORPORATION, by Lisa Anderl, Attorney at Law, 1600 Seventh Avenue, Room 3206, Seattle, Washington 98191.

Barbara L. Nelson, CCR
Court Reporter

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1 JUDGE CAILLE: Let's go on the record. Good
2 morning. We are here for oral statements in an
3 enforcement action, for enforcement of the
4 interconnection agreement between Pac-West Telecomm,
5 Inc. and Qwest Corporation. Today is August 3rd,
6 2005, and we are convened in a hearing room in
7 Olympia, Washington.

8 My name is Karen Caille, and I am the
9 assigned Administrative Law Judge to this proceeding.
10 May I have the appearances for the record, please?

11 MR. KOPTA: Gregory J. Kopta, of the Law
12 Firm Davis, Wright, Tremaine, on behalf of
13 Petitioner, Pac-West Telecomm, Inc.

14 JUDGE CAILLE: Thank you.

15 MS. ANDERL: Lisa Anderl, in-house attorney,
16 representing Qwest Corporation.

17 JUDGE CAILLE: Let the record reflect there
18 are no other appearances. And with that, we are
19 going to begin with you, Mr. Kopta. And we talked
20 about trying to conclude by 11:30, so would you like
21 me to give you a signal, like in -- like 10:20?

22 MR. KOPTA: Sure.

23 JUDGE CAILLE: 10:15?

24 MR. KOPTA: Yeah, why don't we do that and
25 see where we are.

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1 JUDGE CAILLE: Okay. If worst comes to
2 worst, I can be a little late for my other
3 obligation. So let's begin.

4 MR. KOPTA: Thank you, Your Honor.

5 JUDGE CAILLE: Just -- let me just clarify,
6 though, I have read the briefs, so just assume that,
7 you know, I understand what's there, and I will have
8 questions, I'm sure, as we go along.

9 MR. KOPTA: Thank you, Your Honor. That's
10 what I was just going to assume, that you had read
11 the briefs, and I'll try not to be too duplicative of
12 what's in the briefs, although sometimes that's
13 unavoidable. I like what I said so much that I want
14 to say it again.

15 I thought it might be beneficial to try and
16 go through a picture of what we're talking about
17 here. We are talking about essentially what we
18 believe is foreign exchange service. Qwest disagrees
19 and refers to it as VNXX, but that's, in our view,
20 nomenclature, not substance.

21 But in any event, just to give you an idea
22 of how this is configured from a network standpoint,
23 if you look at the diagram that I've passed out and
24 also have on the easel, let's start with Qwest. And
25 if we look at this diagram, disregard the local

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1 calling area, and also carrier -- the carrier
2 designations, and let's just use this for another
3 purpose than what I had originally intended and say
4 that each of these areas, represented by the dotted
5 lines and then there's a black dotted line down the
6 middle, is a different exchange area for Qwest.

7 So we've got Exchange Area A on the left and
8 Exchange Area B on the right. So if a Qwest customer
9 wants to have -- is actually physically located --
10 however one defines physically located -- in Area B,
11 but wants to have a local calling presence, in other
12 words, to have people be able to call them as a local
13 call in Area A, then Qwest offers a service whereby
14 the -- let's look at the -- say it's Customer Number
15 Two, the blue phone in the lower right-hand corner is
16 actually where the customer is.

17 And what Qwest will offer is, to give a
18 presence in Zone A, Qwest will have a dedicated
19 circuit, which can be represented by one of the blue
20 lines between A and B, between Exchange Areas A and
21 B, and switching in Zone A. And the customer will
22 have a telephone number that's been -- is assigned
23 essentially out of the central office in Zone A.

24 So that if Customer One wants to call
25 Customer Two, Customer One dials the number that the

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1 customer -- that the Customer Two has been assigned,
2 it goes first to the A switch, then it's carried over
3 a dedicated facility to the B switch, and is
4 ultimately delivered to Customer Two. So that's how
5 Qwest provides plain vanilla foreign exchange
6 service.

7 Now let's add in Pac-West. They are
8 obviously designated as the CLEC here with their
9 switch, which may or may not be in either exchange,
10 but in this case it is located outside of the
11 exchange. It has Customer Five that wants to have a
12 local presence in -- no, let's say Customer Six, it
13 might be easier. They're outside of the local
14 calling area of both. And it wants to have a local
15 presence in Zone B.

16 So what Pac-West does is assigns numbers to
17 its switch that are -- that correspond with the Local
18 Calling Area B. And so that if Qwest Customer Number
19 Two wants to call the Pac-West customer, then that
20 call goes to the switch in Zone B, the Qwest switch,
21 it is delivered to Pac-West over the green lines, and
22 then Pac-West turns and delivers that call to
23 Customer Six.

24 JUDGE CAILLE: Excuse me, Mr. Kopta. Could
25 you back up just a minute?

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1 MR. KOPTA: Sure.

2 JUDGE CAILLE: Because I think I was writing
3 when you were saying -- so you said it was delivered
4 to -- the call was delivered to the Qwest switch; is
5 that what you said?

6 MR. KOPTA: Yes.

7 JUDGE CAILLE: And is that the box right
8 above the CLEC?

9 MR. KOPTA: No, it would be the box under B.

10 JUDGE CAILLE: Okay.

11 MR. KOPTA: Because that's the switch that
12 serves Customer Number Two, the Qwest switch that
13 serves Customer Number Two.

14 JUDGE CAILLE: What is the box -- what is
15 the box above the CLEC?

16 MR. KOPTA: That would be the Qwest switch
17 in a different local calling area, for purposes of
18 this example.

19 JUDGE CAILLE: Ah, okay. So in other words,
20 it will go through there first and then to the -- or
21 not?

22 MR. KOPTA: No, it -- the switch in A is not
23 involved at all in the CLEC to Qwest's call. What
24 essentially I'm trying to set up here is that you've
25 got two different situations in which, in one case,

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1 it's a Qwest switch that's in a different local
2 calling area, and in the other case, it's the CLEC or
3 Pac-West switch that's in a different local calling
4 area.

5 JUDGE CAILLE: Yeah, I followed you on the
6 Qwest example, but I'm having a problem with this.
7 I'm looking at -- I'm looking at this Number Six, and
8 I'm following it this way, and then this way?

9 MR. KOPTA: Correct.

10 JUDGE CAILLE: So what is this right here,
11 this box?

12 MR. KOPTA: That is the Pac-West switch.

13 JUDGE CAILLE: Oh, that's the Pac-West.
14 Okay. Got it. I thought you said that was the Qwest
15 switch.

16 MR. KOPTA: Ah. Oh, I see what you're
17 saying.

18 JUDGE CAILLE: All right. I understand now.
19 Okay.

20 MR. KOPTA: The box -- excuse me. The box
21 directly above CLEC is the Pac-West switch. I
22 misunderstood and thought you were talking about the
23 box above the box. So hopefully we are all on the
24 same page.

25 JUDGE CAILLE: Hopefully the record is

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1 really clear now.

2 MR. KOPTA: I was going to say, whoever's
3 reading this is maybe going to be a little confused.
4 Hopefully not, but --

5 JUDGE CAILLE: Okay. So then -- so it goes
6 from Six to the Pac-West switch, which is directly
7 above -- the box is directly above the designation
8 CLEC?

9 MR. KOPTA: Correct.

10 JUDGE CAILLE: Then takes the green lines
11 and goes over to the Qwest switch in Area B?

12 MR. KOPTA: Correct.

13 JUDGE CAILLE: Okay. Then could you finish
14 up from -- or carry on from there?

15 MR. KOPTA: Sure.

16 JUDGE CAILLE: Now I understand where I'm
17 going.

18 MR. KOPTA: Right, okay. So if Qwest
19 Customer Number Two makes a call to Pac-West Customer
20 Number Six, then the call goes to the serving Qwest
21 central office over facilities between Qwest's and
22 Pac-West's switch. Then, from -- it's switched at
23 the Pac-West switch and then delivered to Customer
24 Number Six. So essentially, we have a situation
25 where, if Customer Number Two is going to be calling

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1 a Qwest foreign exchange customer, then it's at
2 least, from our point of view, the same as if
3 Customer Number Two were going to be calling a CLEC
4 foreign exchange customer.

5 Now, there were a couple of distinctions
6 that Qwest draws between its service and Pac-West's
7 service, which I'm going to save for a little bit
8 later. I just wanted to make sure that you can
9 visualize what's going on in each of these two
10 scenarios.

11 With that in mind, Pac-West's petition, in
12 our view, is very simple. From our position, our
13 interconnection agreement incorporates the
14 requirements of the FCC's ISP Remand Order. The ISP
15 Remand Order establishes compensation for ISP-bound
16 traffic, either presumed ISP-bound traffic, which is
17 generally the case, or proven ISP-bound traffic,
18 because that's very difficult to actually demonstrate
19 without tremendous expense and tremendous effort;
20 then, generally, it's a presumption that traffic in
21 excess of a three-to-one ratio, which is -- if, for
22 example, to use very small numbers, Pac-West delivers
23 10 minutes of traffic to Qwest and Qwest delivers 50
24 minutes of traffic to Pac-West, the three-to-one
25 ratio means that you assume that 30 minutes of the

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1 traffic is local traffic subject to regular
2 reciprocal compensation and 20 minutes is assumed to
3 be ISP-bound traffic and subject to the provisions of
4 the FCC ISP Remand Order.

5 The ISP Remand Order dispenses with the idea
6 of whether or not the traffic is local. They tried
7 to go that route in the earlier decision, the D.C.
8 Circuit reversed them, sent it back. So on remand,
9 the FCC did away with or started with the idea of
10 whether or not traffic was local, but then departed
11 from that, determined that all ISP-bound traffic is
12 subject to its jurisdiction, and established
13 compensation for traffic that is presumed to be
14 delivered to ISPs that have the same number, a number
15 assigned in the same local calling area as the
16 customer who is making the call.

17 In fact, the Commission, in the arbitration
18 between Level 3 and CenturyTel, reached that same
19 conclusion or interpreted the order the same way,
20 that whether or not the modem on the ISP is located
21 inside the local calling area or outside the local
22 calling area is irrelevant for reciprocal
23 compensation purposes, as long as telephone numbers
24 are both rated within the same local calling area.

25 So from our point of view, in light of our

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1 contract, the FCC ISP Remand Order, and this
2 Commission's interpretation of that order, we are
3 entitled to compensation from Qwest for all traffic
4 that Qwest sends to us between telephone numbers that
5 are rated within the same local calling area without
6 regard to whether our customer happens to be
7 physically located within that local calling area.
8 So we think it's simple. That's it.

9 Qwest, not surprisingly, disagrees, and
10 raises several issues which unnecessarily complicate
11 the analysis, but because they've raised those
12 issues, we obviously need to address them.

13 Qwest interprets the FCC ISP Remand Order
14 very differently than we do and than the Commission
15 has. In Qwest's view, the order is limited to
16 traffic between a calling party and an ISP modem that
17 are both physically located within the same local
18 calling area. I think the Commission has already
19 undertaken an analysis of that, and I'm not going to
20 duplicate that particular analysis, but one of the
21 bases --

22 JUDGE CAILLE: Excuse me, Mr. Kopta. Where
23 is that analysis? Is that in this CenturyTel order?
24 Is that the one you're referring to, the Commission's
25 analysis?

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1 MR. KOPTA: Yes, yes, in terms of --

2 JUDGE CAILLE: CenturyTel, Level 3?

3 MR. KOPTA: Right. And I believe that we've
4 provided the cites in our brief.

5 JUDGE CAILLE: Go ahead.

6 MR. KOPTA: Qwest first maintains that, even
7 though the D.C. Circuit remanded again the FCC's
8 determination on ISP-bound traffic compensation, that
9 the order nevertheless, in toto, remains intact,
10 including the FCC's rationale for why it's treating
11 ISP-bound traffic differently than other types of
12 traffic.

13 Specifically, Qwest maintains that Section
14 251(g) of the Act, which essentially preserves prior
15 compensation mechanisms that existed prior to the
16 enactment of the Act in 1996, in essence means that
17 any call that is not between two parties that are
18 physically located in a local calling area is an
19 interexchange or a toll call, and therefore subject
20 to access charges.

21 That argument fails on several levels.
22 First and most importantly, the D.C. Circuit rejected
23 the FCC's reliance on 251(g), said that it didn't
24 apply. It did not vacate the FCC order, but rather
25 remanded the order to the FCC saying there may be

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1 some basis under Section 251(b)(5) for creating a
2 distinction with ISP-bound traffic.

3 So the D.C. Circuit has determined that
4 251(g) does not apply; but even for argument's sake,
5 if there were some basis on which to argue that there
6 was some preservation of the way things were before
7 1996, the way things were is that there was foreign
8 exchange service.

9 Qwest, in its brief, says it's been offering
10 foreign exchange service for decades. Those calls
11 have been treated as local. If I call a Qwest
12 foreign exchange customer with a number that's within
13 my local calling area, that is a local call to me.
14 It's not a toll call, even though, in point of fact,
15 it crosses a local calling area boundary. That's all
16 that is happening here.

17 Pac-West is providing foreign exchange
18 service because its customer is not physically
19 located within the local exchange, or its modem bank
20 is not physically located within the same local
21 calling area as the calling party, but from a
22 functional standpoint, it's exactly the same.
23 Therefore, if there was a preservation of that prior
24 system, to the extent that there was, what we're
25 asking for doesn't change that, nor does the FCC's

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1 ISP Remand Order.

2 JUDGE CAILLE: Mr. Kopta, related to the FX
3 service that Qwest offers, Qwest makes an argument
4 about who is paying for that service. Could you
5 address -- do you know what I'm talking about?

6 MR. KOPTA: Yes.

7 JUDGE CAILLE: Could you please address
8 that?

9 MR. KOPTA: Sure. What Qwest contends is
10 that when it provides foreign exchange service, the
11 customer who's subscribing to that service pays a
12 separate charge for the dedicated facility. And
13 again, we go back to our drawing, the blue line
14 between Switch A and Switch B, as well as, I believe,
15 they can correct me if I'm wrong, switching in the
16 local calling area where they want their presence.

17 So from Qwest's perspective, the customer is
18 paying the -- I suppose what they would consider to
19 be the equivalent of the toll that ordinarily would
20 have applied. Sort of a way of providing an 800
21 service, if you will, if you want to think of it
22 somewhat differently. And in Qwest's view, that
23 differentiates its FX service from the service that
24 Pac-West provides.

25 There are a couple of things wrong with

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1 that. First, Pac-West provides the same identical
2 functionality. As far as what the customer pays, in
3 Pac-West's price list, there is a price for service
4 that includes an FX type functionality. However,
5 Pac-West, as virtually all CLECs, has individual case
6 basis contracts with customers and, under this
7 Commission's rules, can enter into contracts with
8 rates that are lower than what's in the price list in
9 order to be able to provide service to them without
10 having to file the contract with the Commission. So
11 if --

12 JUDGE CAILLE: Just to be clear --

13 MR. KOPTA: Yes.

14 JUDGE CAILLE: -- is that contract the
15 contract that we're talking about between you and
16 Qwest?

17 MR. KOPTA: No.

18 JUDGE CAILLE: No, okay. Thank you.

19 MR. KOPTA: This is a customer contract.

20 JUDGE CAILLE: Okay.

21 MR. KOPTA: So that that price is obviously
22 negotiable, and one of the things that would go into
23 the consideration of what a customer is charged is
24 what a customer is getting.

25 So I have no knowledge that this is actually

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1 happening, but I'm just talking about theoretically,
2 the customer could be charged less if it does not get
3 FX functionality. So there may, in fact, be some
4 cost recovery for FX that is distinct from the rest
5 of the service, but the major point here is that,
6 from the customer's perspective that is calling the
7 FX subscriber, as well as from the carrier's
8 perspective, those services are identical.

9 If a Pac-West customer calls a Qwest foreign
10 exchange customer, that call is a local call. If a
11 Qwest subscriber makes a call to a Pac-West customer
12 who subscribes to service with FX functionality, that
13 call is a local call, and in both cases, either
14 reciprocal compensation or compensation under the ISP
15 Remand Order, as incorporated into the
16 interconnection agreement, applies.

17 So just because Qwest -- Qwest's customer
18 pays more for FX service has no bearing on the
19 reciprocal compensation or whatever type of
20 compensation is owed between the carriers of the two
21 customers of the calling parties. Did that address
22 your questions?

23 JUDGE CAILLE: Yes.

24 MR. KOPTA: Okay. There are other examples
25 of this same type of phenomenon. In the diagram, I

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1 showed you plain vanilla FX, but Qwest has other
2 services that provide a similar functionality. One
3 of them we mentioned in the brief is market expansion
4 line, or MEL, which allows a customer to establish a
5 call forwarding mechanism so that it can have calls
6 from other subscribers within the same local calling
7 area and have their calls transferred to a number
8 that is outside of the local calling area.

9 Again, Qwest distinguishes this by saying
10 that the MEL customer pays toll charges between its
11 number and the number that it's forwarded the calls
12 to, but that's irrelevant from a compensation --
13 intercarrier compensation standpoint, because if a
14 Pac-West customer calls a Qwest MEL customer,
15 Pac-West pays Qwest reciprocal compensation, even
16 though, in Qwest's definition, that is a toll call to
17 which, if it were treated as a toll call, Pac-West
18 would be entitled to originating access charges.

19 Qwest also provides voice mail service. One
20 of the features of voice mail is to call the party
21 that left you the message. If that party happens to
22 have called from outside of the local calling area,
23 then that call --

24 MS. ANDERL: I'm going to object, Your
25 Honor. Mr. Kopta is bringing up an issue that was

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1 not previously discussed in brief and which I do not
2 think is supported by facts in evidence.

3 JUDGE CAILLE: Could you please explain that
4 a little bit further?

5 MS. ANDERL: Your Honor, voice mail has not
6 been previously raised as an issue. Whether or not
7 the call-back feature after -- on a voice message
8 does complete a long distance call or not is not an
9 issue that I'm prepared to respond to, because it was
10 never brought up, and I do not know if Mr. Kopta's
11 going to claim that this voice mail, push 88 and
12 return the call, accomplishes such a function, but I
13 do not believe that it is appropriate to bring it up
14 at this juncture. That's why I would object.

15 JUDGE CAILLE: And your response, Mr. Kopta?

16 MR. KOPTA: Well, there was a discussion of
17 -- an extensive discussion in Qwest's brief of
18 enhanced service provider and exemptions from toll
19 charges, ESP for enhanced service provider. Voice
20 mail functionality is an enhanced service. This is
21 just an example of an enhanced service in which there
22 is additional functionality beyond what's happening
23 in the local calling area, and it's simply another
24 example of what I'm talking about, but --

25 JUDGE CAILLE: Why don't we just try to

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1 stick to the VNX issue. And I understand what you're
2 -- that you're offering that as an example, but since
3 we have a limited amount of time, let's focus on it.

4 MR. KOPTA: Okay. No, that's fine. The
5 other example, and this one is one that Qwest raises
6 in its brief, is PBX service.

7 JUDGE CAILLE: Yes, and could you just
8 describe PBX for the record, please?

9 MR. KOPTA: Sure. PBX stands for private
10 branch exchange. Large businesses generally are
11 customers of PBX type service. They will have --
12 they will buy lines from Qwest to connect equipment
13 that is in their business location to the Qwest
14 network and, in turn, they will connect their own
15 lines to that PBX, so that Qwest provides the big
16 pipes, if you will, from its serving central office
17 to the customer location equipment, and beyond that
18 is the customer's responsibility.

19 So in one example, you could have a building
20 in downtown Seattle. Use my law firm as an example.
21 We take up several floors of an office building and
22 our offices are wired so that our lines to our
23 telephones go to a central location, which is where
24 essentially PBX type on-premises equipment is, and
25 that's taken care of by us.

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1 And Qwest has -- if it were Qwest that were
2 providing our service -- would provide a batch of
3 telephone numbers to go along with that, but
4 essentially, it's our responsibility to tie in our
5 telephone instruments to that on-premise equipment.
6 And I told you one way that it could be done, but as
7 Qwest essentially acknowledges in its brief, it
8 doesn't have to be lines all within an office.

9 If, for example, we had a satellite office
10 in Tacoma, we could get a private line between Tacoma
11 and Seattle, our office in Seattle, assign that
12 numbering telephone in Tacoma one of our Seattle
13 numbers, hook it up to the PBX, and from Qwest's
14 perspective, that's just there sitting in our office
15 in downtown Seattle.

16 But, again, that is, by Qwest's definition,
17 a toll call. Qwest differentiates that by saying,
18 Well, this is a private network that we have
19 constructed and, therefore, it's beyond Qwest's
20 control to look at and it's not something that
21 involves the public switched telephone network, PSTN,
22 but from an end-to-end analysis, which is what Qwest
23 is advocating, it is, in fact, a toll call.

24 And if, assuming that our offices are served
25 by Qwest, a Pac-West customer calls that telephone

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1 number in downtown Seattle, it will be a local call.

2 JUDGE CAILLE: Let me just check to make
3 sure I'm following this. So with the PBX set up at
4 your office in Seattle, and then you set up the
5 satellite office in Tacoma, are you saying that
6 that's going to be -- you can still use the same PBX,
7 but that's going to be toll instead of local?
8 Because --

9 MR. KOPTA: No, it won't be toll.

10 JUDGE CAILLE: It won't be toll. Okay. Got
11 it. That's what I thought. I thought I
12 misunderstood. Okay.

13 MR. KOPTA: What we would have done in those
14 circumstances is to purchase or construct our own
15 facility between our office in downtown Seattle and
16 the office in Tacoma.

17 JUDGE CAILLE: Okay.

18 MR. KOPTA: We could go to Qwest to get
19 that, we could go to Pac-West to get that, we could
20 do it ourselves. But in either event, the physical
21 location of that customer is in Tacoma, even though
22 he or she has a telephone number and a local calling
23 presence in Seattle. And this all happens because of
24 numbering.

25 Qwest makes quite a bit about whether there

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1 are improper or proper uses of numbering resources,
2 but the bottom line is that this industry relies on
3 telephone numbers for rating and routing telephone
4 calls. There is not the physical capability, and
5 Qwest doesn't claim otherwise, to go behind those
6 telephone numbers and determine where is the exact
7 geographic physical location of the instrument from
8 which that call originates or the instrument to which
9 that call terminates.

10 JUDGE CAILLE: You have five minutes, and
11 then it will be 10:15. Can you kind of tell me where
12 you are?

13 MR. KOPTA: Yeah, I think I should be able
14 to finish in the next probably 10 to 15 minutes.

15 JUDGE CAILLE: Okay.

16 MR. KOPTA: That is why Qwest, in its
17 relief, is asking that Pac-West be required to obtain
18 number resources differently than it is, because
19 that's the way that calls are rated and routed, is
20 through telephone numbers. And that's the way that
21 things were before the '96 Act and that's the way
22 things are after the '96 Act.

23 So there are going to be circumstances in
24 which a customer of one carrier is located in a
25 different -- geographically different area than a

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1 Qwest customer, but because the numbers are both
2 rated within the same local calling area, that, for
3 all intents and purposes, to both Qwest and Pac-West,
4 is a local telephone call.

5 I gave you some examples of some Qwest
6 products. It's not just foreign exchange, but other
7 types of products that allow this same type of
8 functionality.

9 Unless the Commission is willing to
10 eliminate that type of functionality and require that
11 all numbers be used, based on the actual physical
12 location of the calling and the called party, those
13 anomalies, if you will, are going to exist.

14 One other point that Qwest makes, again, has
15 to do with this physical location issue about where
16 there is or is not a presence, quote, unquote, in a
17 local calling area. This is, again, part of the
18 problem of trying to figure out where a customer is
19 physically located. How do you define where a
20 customer is physically located?

21 For example, if we go back to the diagram,
22 the green lines, in most instances the majority of
23 Qwest -- of traffic between Qwest and Pac-West is
24 carried over facilities that Pac-West has obtained
25 from Qwest out of its special access tariff. These

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1 are dedicated facilities that Pac-West pays for in
2 their entirety between the Pac-West switch and
3 Qwest's switches in several different local calling
4 areas.

5 So the question is is that a presence for
6 our customers, because we have a facility that goes
7 into the local calling area. If Qwest is providing
8 service to a customer that has its own equipment in
9 the Qwest central office and yet is physically
10 located someplace else, a call center, a reservation
11 center, an airline information center, is that a
12 physical presence within that local calling area,
13 even though the call is ultimately answered by
14 someone or a machine that happens to be in a
15 different local calling area.

16 And the complexity of trying to determine
17 physical location is one of the reasons that the
18 industry has agreed to rely on numbers and to
19 expressly state in the guidelines that there are
20 exceptions that, while generally you're talking about
21 customers that are physically located within the same
22 local calling area, there are exceptions, and there
23 are. And the question is whether that's permissible.
24 It certainly is within the industry's viewpoint.

25 The last thing that I want to touch on is

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1 the public policy impacts of this decision that the
2 Commission has before it. Technically, this is a
3 contract enforcement action, which the Commission
4 should simply look at the requirements of the
5 contract and applicable law as a practical matter.
6 However, the Commission generally wants to consider
7 the public policy impacts of whatever decision that
8 it makes.

9 From a public policy standpoint, Pac-West
10 is, in most cases, paying for the transport of calls
11 from a Qwest local calling area to its customer. So
12 Qwest incurs no greater cost, and in fact, in some
13 ways, less cost to hand this traffic over to Qwest
14 than it would to deliver it to someone else in the
15 local calling area.

16 So from a cost perspective, there's no drain
17 on the customers -- other customers of Qwest that are
18 somehow footing the bill for this type of traffic if
19 Qwest incurs the switching costs within its network
20 and whether it incurs them itself or pays it to
21 Pac-West, those are still costs that Qwest incurs and
22 are still part of local rates.

23 What is a problem, however, is if the
24 Commission were to decide that Pac-West is not
25 entitled to provide this type of service or will

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1 receive no compensation from Qwest if it does provide
2 the service. Because, essentially, that means a big
3 part of ISP-bound traffic will dry up.

4 This is one area in which CLECs compete for
5 service. It's one reason why ISP dial-up rates are
6 as low as they are, particularly in areas where
7 high-speed access is not available or in areas where
8 people can't afford to pay \$50 for DSL or cable modem
9 service, but can pay \$20 for Earthlink or AOL.
10 That's going to be a real hardship, because it may --
11 it very likely will not be \$20 anymore, at least in
12 those areas, if an ISP has to establish a modem bank
13 in every single local calling area or if they have to
14 obtain foreign exchange service from Qwest. But,
15 again, that's exactly the same functionality that
16 Pac-West is providing.

17 So we have an issue of discrimination, as
18 well as anticompetitive impact, because not only does
19 Qwest -- would Qwest want to keep that customer for
20 its local exchange and obtain those FX revenues,
21 Qwest has an affiliate that is an ISP. And if no
22 other ISPs are willing to provide service in a
23 particular area, then it's very likely that Qwest's
24 affiliate will be able to.

25 So again, it's not competition within the

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1 telecommunications industry, but it also affects
2 competition within the ISP dial-up industry.

3 And the other thing to keep in mind, if you
4 look at the Core decision, which is described in the
5 arbitrator's decision that we've attached to our
6 petition, the FCC lifted growth caps and new market
7 restrictions because it found that a lot of the
8 concerns that it had originally laid out in its ISP
9 Remand Order were no longer the case. This is not a
10 major arbitrage type of opportunity. In fact, the
11 amount of ISP dial-up is decreasing as cable modem
12 and DSL penetration increases.

13 So this is a situation where we've got --
14 most of the ISP dial-up customers right now are those
15 who can't afford or don't have access to DSL or cable
16 modem service. That's the type of market that we are
17 dealing with here and that's the type of market that
18 will be severely impacted if the Commission decides
19 other than to interpret our agreement and the FCC ISP
20 Remand Order as it has in the past and as we advocate
21 here.

22 One final note. Other state commissions
23 have gone across the board. Qwest is incorrect in
24 saying that the vast majority have agreed with Qwest.
25 There are a variety of decisions and there are some

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1 in which state commissions have said that access
2 charges should apply to foreign exchange type
3 traffic, there are commissions in which they've
4 decided that ISP Remand Order compensation applies,
5 and then there are hybrid cases.

6 Wisconsin, there's an arbitration decision
7 in which the commission decided that the ISP Remand
8 Order applies to ISP-bound traffic, even if it's
9 foreign exchange traffic, but not to voice traffic
10 that's foreign exchange.

11 California is another hybrid, which Qwest
12 mischaracterizes as saying that no compensation is
13 owed. In fact, California Commission requires per
14 minute of use compensation for ISP-bound traffic that
15 is provisioned through foreign exchange service.
16 What they have said is that carriers have to -- or
17 CLECs need to carry their share of the load of
18 transport, so that they need to at least have
19 interconnection facilities with the ILEC in each of
20 the tandems in a particular LATA.

21 Pac-West goes far beyond that by
22 establishing connections that it is solely
23 financially responsible for in Washington into local
24 calling areas, in other words, to end offices, not
25 just the tandems.

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1 So we would caution the Commission in terms
2 of looking to other states, because others, such as
3 New York, have done what we are advocating here, and
4 which essentially the Commission has set up for doing
5 based on its prior arbitration decisions.

6 JUDGE CAILLE: Mr. Kopta, I believe it's the
7 -- let me see. I'm getting the two mixed up. The
8 AT&T arbitration that the Commission did hear talks
9 about what is a local call. And can you tell me what
10 is different about the case before me that we
11 shouldn't follow that AT&T reasoning?

12 MR. KOPTA: I'm not saying that you
13 shouldn't follow the AT&T reasoning necessarily, but
14 I understand the reason to be is that AT&T proposed a
15 very broad definition. The Commission looked at it
16 and said, That's got -- that's too unknown at this
17 point how that's going to work, and it may cause
18 unforeseen problems that we're not ready to simply
19 sign off on at this time. But in no way, shape or
20 form did the Commission exclude foreign exchange type
21 traffic from being considered local traffic. Rather,
22 the Commission said, Use Qwest's definition. If
23 that's going to cause -- if that causes some
24 discriminatory problems, then bring it back to us to
25 decide.

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1 The arbitrator suggested some ways that
2 might help to resolve the parties' issues, but the
3 Commission, in its order, said those are nothing but
4 suggestions, they're not binding on us, and they're
5 not binding on any future disputes.

6 JUDGE CAILLE: So are you referring to the
7 arbitrator's suggestion of bill and keep?

8 MR. KOPTA: Yes.

9 JUDGE CAILLE: Okay. Is it possible to
10 distinguish whether a VNX call is to an ISP or if
11 it's used as a voice call? I'm not sure if I --
12 these are my own words, so you'll have to kind of
13 interpret my -- but my concern is it seemed to me
14 like the ISP order is sort of making an exception for
15 ISP calls, and I'm not sure that it's -- that you can
16 distinguish or you know what is actually happening.
17 So could you comment on that?

18 MR. KOPTA: Sure. Both Pac-West and Qwest
19 have said we don't always know when our customers are
20 ISPs. We know that we have a connection to them, we
21 know that they're obtaining service from us, but we
22 don't necessarily know that they're an ISP. Now, AOL
23 calls, then I guess we have a pretty good idea that
24 they're an ISP, but there are a lot of different
25 types of ISPs out there and neither one of us knows,

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1 and that's one of the reasons that the FCC decided
2 that they would create this presumption, because if
3 the traffic is that far out of balance, then they
4 simply presume that it must be ISP-bound traffic. It
5 may or it may not be. It may be calls to the local
6 area network.

7 I can call in from my home phone over my
8 computer to log on to our network. That's going to
9 be a long -- can be a very long call, not to an ISP.
10 It's just so that I can read e-mails or work on a
11 document that happens to be stored in our computer at
12 work. But who knows what I'm using that connection
13 for. It's got a long hold time, so it's just easier
14 to presume that, given that that's a pretty -- a long
15 duration call, that it's a data call of some type and
16 if it's a data call of some type, and it may very
17 well be an ISP dial-up call.

18 So the FCC said, Let's look at the traffic.
19 Within a three-to-one ratio, we're going to say
20 that's local, because there are going to be those
21 kind of situations where you've got customers that
22 mostly make outbound calls. But if it's above that,
23 then we're just going to presume that it's ISP
24 dial-up.

25 JUDGE CAILLE: Now, has that been changed by

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1 the Core?

2 MR. KOPTA: No, it has not.

3 JUDGE CAILLE: Okay.

4 MR. KOPTA: The FCC, in its ISP Remand
5 Order, in addition to establishing certain levels of
6 compensation, said you have to take the total number
7 of minutes that you exchange, and each year it's
8 capped at a certain level. What the Core decision
9 did was to say we're taking those caps away.

10 JUDGE CAILLE: All right. Thank you.

11 MR. KOPTA: Thank you.

12 JUDGE CAILLE: Ms. Anderl.

13 MS. ANDERL: Thank you, Your Honor. Lisa
14 Anderl, on behalf of Qwest.

15 Your Honor, this case, we believe, presents
16 a very serious question to the Commission with regard
17 to the use of VNXX service. We believe that if the
18 Commission allows VNXX at all, it should only do so
19 within the constraints established by the Level
20 3-CenturyTel Arbitration and the AT&T decision, both
21 of which direct that that traffic should be exchanged
22 on a bill and keep basis and no compensation should
23 apply.

24 More seriously, though, if Pac-West prevails
25 in obtaining compensation for these VNXX type calls,

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1 it calls into question the larger issue of why do we
2 even have local telephone numbers. You know, the
3 melodramatic lawyer would say that this scheme would
4 rip apart the very fabric of the public switched
5 telephone network. Now, I'm not that type of lawyer,
6 and so I won't say that, but I think that, melodrama
7 aside and in all seriousness, we do have to consider
8 how the numbering system and the public switched
9 telephone network are integrated and create a system
10 upon which carriers rely.

11 Mr. Kopta is partially right that calls are
12 rated and routed in accordance with the NPA NXX and
13 not the customer location. He's partially wrong, as
14 well, because NPA NXX numbers are synchronized with
15 customer locations in all but the rarest of
16 circumstances. And it is that combination of
17 factors, rating and routing in accordance with NPA
18 NXX, and NPA NXX synchronized with customer location
19 that makes this system work.

20 If the Commission allows VNXX numbers in the
21 way that Pac-West proposes to use them, customers,
22 residential customers, business customers, could have
23 multiple telephone numbers assigned to their line
24 whereby they could be reached by customers in other
25 local calling areas for free, absolutely decimating

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1 the structure of toll and access charges in the
2 state.

3 For example, if I lived in Seattle, which I
4 do, and wanted to receive calls from a college
5 student in Bellevue and a friend in Olympia and
6 another colleague in Vancouver, I could simply ask my
7 local telephone company to assign me numbers for
8 those three local calling areas. People in those
9 local calling areas could call me for free if the
10 numbers are assigned the way Pac-West would like to
11 assign them. I would pay nothing extra, the calling
12 parties would pay nothing extra, and yet everyone
13 knows those are toll calls, and VNXX is nothing more
14 than a toll avoidance mechanism, a mechanism, as
15 we've discussed in our brief, that this Commission
16 has recognized and disallowed in the past because of
17 the negative public policy consequences that flow
18 from allowing customers and carriers to avoid payment
19 for their access to the public switched telephone
20 network.

21 Responding to some of the --

22 JUDGE CAILLE: Excuse me, Ms. Anderl.

23 MS. ANDERL: Yes.

24 JUDGE CAILLE: Would you say that bill and
25 keep would be the fix for this?

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1 MS. ANDERL: If VNXX calls are to be
2 allowed, yes.

3 JUDGE CAILLE: Okay.

4 MS. ANDERL: I'd like to talk a little bit
5 about the difference between VNXX and FX. And Your
6 Honor, I think you did put your finger on it when you
7 asked Mr. Kopta to address the issue of who pays for
8 FX service on Qwest's network.

9 On Qwest's network, when Qwest offers
10 foreign exchange service, there is no free ride. The
11 Bellingham customer who wants Seattle customers to be
12 able to call him obtains a local business connection
13 in the Seattle central office and a local telephone
14 number in Seattle, and pays for every mile of the
15 transport to carry that call from Seattle back up to
16 Bellingham on a dedicated connection. That is the
17 substitute for that customer or his customers paying
18 toll charges for that call.

19 Pac-West customers pay nothing. End users
20 of Qwest and other companies who call the Pac-West
21 ISPs pay nothing for this VNXX functionality. Mr.
22 Kopta said, you know, it may be that there's some
23 cost recovery in some of the contracts that Pac-West
24 enters into that are not filed with the Commission.
25 We have no way of knowing that. I don't believe Mr.

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1 Kopta knows that.

2 The plain fact of the matter is is that the
3 Pac-West price list doesn't even mention VNXX
4 service. Pac-West gives this away under terms and
5 conditions which we don't even know. I mean, it also
6 may be that Pac-West pays its ISP customers to be on
7 Pac-West's network, because Pac-West believes it can
8 get such rich compensation from Qwest for ISP-bound
9 calls. We don't know. What we do know is that there
10 is no direct payment that corresponds for access to
11 the network in the way that FX is compensated.

12 JUDGE CAILLE: Ms. Anderl, I asked Mr. Kopta
13 this, in relationship to the VNX service. With the
14 FX service, can you distinguish whether a call is
15 going to an Internet service provider or whether this
16 is a voice call, or do you know, from -- I guess you
17 know who subscribes, so is this -- I'm trying to
18 distinguish the two services, and is this a -- I'm
19 trying to determine if this is a distinguishing
20 factor.

21 MS. ANDERL: Not really. A customer of
22 Qwest could be an ISP and buy FX service from us. In
23 fact, I think some do, and that's fine, because they
24 pay for the dedicated facilities. They pay for their
25 own private network. Customers of Pac-West who are

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1 ISPs do not do that.

2 However, it is true that we don't always
3 know, when a customer orders service, whether they,
4 on their end, are going to be hooking it up to a
5 modem bank or not.

6 JUDGE CAILLE: So who is your typical FX
7 customer?

8 MS. ANDERL: Our typical FX customer might
9 be an airline reservation center who wants to have --
10 United Airlines wants you, Judge Caille, to be able
11 to call their reservation desk at Sea-Tac, and so
12 they obtain an Olympia number. Other businesses who
13 wish to appear to have a local presence, for example,
14 there could be a roofing company in Lynnwood who
15 wants to get customers in the Renton or Kent area and
16 wants to advertise in the Yellow Pages with a local
17 Renton or Kent number. That could be a foreign
18 exchange customer. There are ISP customers who are
19 foreign exchange customers, as well.

20 The point, though, I think that we don't
21 want to lose sight of in Qwest's network, foreign
22 exchange customers comprise less than .3 percent of
23 Qwest's lines. With Pac-West, VNXX traffic comprises
24 nearly 65 percent of the traffic that Pac-West sends
25 -- Pac-West's customers cause to flow into them.

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1 And we know that because we have examined
2 the trunk groups that are used and we know that there
3 is one-way traffic only on those. We know that there
4 is no local calling on them, because calls don't come
5 back the other way. A call goes from a Qwest
6 subscriber in Bellingham down to Seattle or Tukwila.
7 No calls ever come back the other way. That leads a
8 person to conclude, with a fair degree of certainty,
9 given what is publicly known about Pac-West's
10 business model, that those are calls to an ISP and
11 that those are not local calls. Those are calls
12 placed to a VNXX number, where the Bellingham
13 subscriber would otherwise have had to dial a
14 one-plus or Pac-West would have had to purchase a
15 private line or Pac-West would have had to offer --
16 or Pac-West's ISP, rather, would have had to offer an
17 800 service to otherwise allow that type of access.

18 And so to the extent that Pac-West's
19 argument here is, Well, the difference is just a
20 matter of degree, in the first place, we think that's
21 not so, because we believe we've established
22 critically differentiating factors between the two
23 services, but in the second place, even if it were
24 just a matter of degree, that's critical. VNXX, to
25 the extent that it is FX like, is not, in Pac-West's

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1 business model, an exception.

2 FX is an exception. The numbering
3 guidelines recognize foreign exchange as an
4 exception, Qwest treats it in its network as an
5 exception. Anything less than one percent, I think,
6 must be seen as an exception or de minimis. When
7 VNXX turns into 65 percent of a company's business, I
8 don't think it's appropriate any longer to refer to
9 it as an exception, nor do I think that it's
10 appropriate to give it exception status. It has
11 become the rule. And it is not appropriate as the
12 rule.

13 With regard to the other service that Qwest
14 offers that Pac-West mentioned in its oral argument
15 and its brief, this is the market expansion line, or
16 the MEL service. That is simply call forwarding, and
17 what you have there are two telephone calls. If you
18 have a Seattle customer dialing a MEL customer, also
19 in Seattle, and that MEL customer has forwarded the
20 call to Olympia, what there is is a local call from
21 Seattle to Seattle, and then a second call that is a
22 toll call from Seattle to Olympia.

23 So remote call forwarding or the market
24 expansion line really involves two telephone calls.
25 It's not a single call. The first call is

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1 appropriately treated as local, the MEL customer may
2 also have forwarded that line to another local
3 number, in which case there'd be two local calls, or
4 they may have forwarded it to outside the local
5 calling area number, in which case it is a long
6 distance call.

7 That second call is treated and compensated
8 as long distance, both from an intercarrier
9 compensation standpoint and from a customer
10 standpoint. The customer pays toll charges on that.

11 But it is incorrect to think of that
12 functionality as comprising a single telephone call,
13 and that is what we believe is the distinction
14 between the MEL service and the FX.

15 MEL is also different from VNXX because it
16 is, as I said, compensated by the customer who wishes
17 to take advantage of it and it is a very significant
18 exception in Qwest's network, as opposed to a rule.
19 It is probably -- it is maybe available or used by
20 one percent of the lines, maybe, maybe one and a half
21 percent, and we don't know that all MEL calls -- that
22 the second call is long distance in each case. It
23 may not always be.

24 So I think that both FX and MEL are really,
25 as I said in my brief, red herrings. They're not

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1 VNXX, and VNXX is not those types of calls.

2 And the difference, really, with regard to
3 the FX service, is the presence of a dedicated
4 facility. Pac-West and Pac-West's customers do not
5 have the dedicated facilities, do not have a private
6 network, and in effect, are enabling Qwest and other
7 subscribers to make what would otherwise be a toll
8 call. Qwest's tariffs, as well as Pac-West's
9 tariffs, accept the exchange boundaries that Qwest
10 has on file with the Commission. Qwest's exchange
11 boundaries define local calling areas. Qwest's
12 tariffs define local calling areas. Local calls are
13 defined as calls between customer premises that are
14 located within the same local calling area.
15 Premises are defined as physical locations.

16 And so it is unavoidable here that local
17 calls are determined by the physical locations of the
18 calling and called parties. And the fact that
19 technology may allow a company to subvert that or
20 circumvent it does not make it right and does not
21 make it acceptable.

22 I'd like to talk a little bit about the
23 public policy impacts that Mr. Kopta mentioned at the
24 end of his argument. And Your Honor, before I do
25 that, I wonder, are you keeping time for me, because

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1 I did not notice.

2 JUDGE CAILLE: Actually, I haven't been.

3 I'm not -- I thought maybe you started at --

4 MS. ANDERL: 10:30?

5 JUDGE CAILLE: -- 10:30, between 10:30 and

6 10:35.

7 MS. ANDERL: Okay. So I still have some

8 time.

9 JUDGE CAILLE: So when do you want me to
10 warn you?

11 MS. ANDERL: You know, I think I'll probably
12 be finished by 11:00, if that won't run me over time.

13 JUDGE CAILLE: No, that should work just
14 fine.

15 MS. ANDERL: Okay. Public policy impacts.
16 I think that any sort of, you know, doom and gloom
17 scenarios that Pac-West paints in terms of public
18 policy impacts are significantly overblown. In the
19 first place, we need to think about whether -- why is
20 dial-up so cheap.

21 Mr. Kopta indicates that cheap dial-up is a
22 good thing and it allows people to have access who
23 otherwise wouldn't. I agree that cheap dial-up is a
24 good thing and it is something that should be
25 encouraged, but not if it is subsidized by Qwest.

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1 Subsidized dial-up is not a good thing and it sends
2 the wrong price signals to the market, it sends the
3 wrong price signal to Pac-West, it discourages
4 deployment of broadband, in fact, in areas where it
5 might otherwise be deployed, because subsidized
6 dial-up is sometimes, for customers, good enough.
7 That is the wrong outcome.

8 I do not believe that there will be
9 significant negative financial impacts on CLECs such
10 as Pac-West if the Commission decides properly not to
11 compensate VNXX traffic, because Pac-West, up until
12 2003, was operating under the per minute of use caps
13 that had been imposed by the FCC's ISP remand order.
14 Under the per minute of use caps, Pac-West was
15 compensated for far less ISP-bound traffic than it is
16 today, even with the exclusion of VNXX traffic.

17 Now, of course, I want to be careful about
18 disclosing confidential information about minutes of
19 use, but I did say in my brief, and I do not believe
20 this discloses anything confidential, that in 2004,
21 even leaving aside the disputed minutes for VNXX
22 traffic, Qwest compensated Pac-West for three times
23 more minutes of use than it did in 2003, because of
24 the lifting of the caps.

25 Pac-West and others were surviving

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1 financially in 2003 when they, say, had a thousand
2 minutes of use. They're certainly doing much better
3 in 2004, where they're being paid for 3,000 minutes
4 of use. These are, of course, made up numbers.

5 The fact that Qwest would exclude --
6 excludes a certain number of additional minutes
7 because they are VNXX is not going to have, we
8 believe, negative financial impacts on Pac-West.

9 In addition, when the FCC lifted the per
10 minutes of use cap, I think that we have to
11 understand that the FCC was likely, at that point in
12 time, mindful of the fact that many, many states had
13 already addressed the VNXX issue and decided
14 properly, in my view, that VNXX would not be
15 compensated.

16 There are a few that go the other way. Mr.
17 Kopta mentions one Wisconsin case and mentioned in
18 his brief one Connecticut case. We believe, if you
19 read our brief and the attachment that details the
20 state authority, the cases that have sided with
21 Pac-West's view are clearly the outliers.

22 And so when the FCC said, Well, we are not
23 going to have per minute of use caps anymore, that
24 was in an environment when there were already a
25 number of decisions that said VNXX is not going to be

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1 compensated. And I think the FCC must have taken
2 that into account when they decided to lift the caps,
3 knowing that the per minutes of use would not be out
4 of hand, would not be inappropriately unbalanced,
5 because those -- that lack of balance and that
6 arbitrage was exactly why they placed the caps on the
7 dial-up minutes in the first place.

8 There are a few points that I would like to
9 mention from the Pac -- in addressing specifically
10 the Pac-West brief. Pac-West has gone back and forth
11 on this issue a couple of times. In their petition,
12 Pac-West says Qwest must compensate us for all
13 ISP-bound traffic. In discovery, Pac-West said,
14 Well, no, not -- when we say all ISP-bound traffic,
15 we don't mean all traffic that's bound for an ISP.
16 We mean locally-dialed ISP-bound traffic. Now, in
17 Pac-West's brief, Pac-West is back on its position
18 that you must compensate us for all ISP-bound
19 traffic.

20 It's unclear to me what's going on here, but
21 let me just explain what I think is happening, and
22 that is that what Pac-West would like you to believe
23 is that there is no exception to the rule that
24 traffic bound for an ISP must be compensated, but
25 there are exceptions. There are significant

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1 exceptions.

2 Pac-West agrees that if you, sitting here in
3 Olympia today, need to reach a dial-up Internet
4 access provider who has a Seattle telephone number,
5 and you dial 1 plus 206 plus the telephone number,
6 that that call is not ISP-bound under the FCC's ISP
7 Remand Order, and that toll and access charges should
8 apply to that call. And so clearly there are
9 instances where traffic bound for an ISP is not
10 compensable under the ISP Remand Order.

11 What Pac-West would like to have happen
12 here, though, is if that identical call is made
13 endpoint to endpoint, but overlaid with the numbering
14 convention of VNXX, where you dial a local number
15 instead of the Seattle number, but reach the same
16 endpoint, then not only would they like for you not
17 to pay toll and for no access charges to apply, but
18 they would like Qwest, assuming you're a Qwest
19 customer, to compensate them for that call.

20 It stands the intercarrier compensation
21 system completely on its head. And we believe that
22 if you look at a call like that and simply -- it
23 illustrates very, very clearly what type of a call it
24 is. It's a toll call. And as the Commission has
25 held in Metrolink and U&I CAN and other cases of that

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1 ilk, clever dialing patterns shouldn't be allowed to
2 avoid the true nature of the call.

3 One other thing that I would like to respond
4 to, and then I believe I have already covered my
5 points, is in paragraph 29 of their brief, Pac-West
6 contends that we are, for the first time, raising a
7 volume dispute.

8 JUDGE CAILLE: Excuse me. Let me just get
9 there.

10 MS. ANDERL: Yes.

11 JUDGE CAILLE: Okay.

12 MS. ANDERL: Pac-West attaches to its brief,
13 in Confidential Exhibit B, and says that Pac-West is
14 now contending for the first time that over 20
15 percent of the amount Qwest has withheld are
16 attributable to a volume dispute. Pac-West goes on
17 to say Qwest has never raised this issue with
18 Pac-West, much less explained the basis for this
19 dispute or how Qwest calculates this figure.

20 We take exception to that, Your Honor. If
21 you go to Confidential Exhibit B on the back of
22 Pac-West's brief --

23 JUDGE CAILLE: Got it.

24 MS. ANDERL: -- I would simply point out to
25 you that there is a section of the brief at the left,

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1 or section of the exhibit at the left that has a
2 larger heading, local traffic billed, and the first,
3 -- well, the first column that isn't a column with
4 dates in it says ISP minutes, and if you can see the
5 2004 totals, there's a rather large number there that
6 starts with a nine.

7 JUDGE CAILLE: Yes.

8 MS. ANDERL: And if you go across one, two,
9 three, four, five columns under the larger heading
10 Qwest Cross 7 MOU, those are minutes of use as
11 measured by Qwest's Cross 7 system. And if you look
12 at the column that is entitled Local/VNXX 110 MOU,
13 you can see that there's a differential there that
14 does represent almost a 20 percent reduction in those
15 minutes of use. And it is that differential that is
16 the volume disputes minute -- volume dispute
17 regarding minutes of use.

18 That dispute had been called to Pac-West's
19 attention since January 12th of 2005, and this -- so
20 this is not new. And I would just like to indicate
21 that the document in the record that shows Qwest
22 bringing this up to Pac-West that early is attached
23 to the petition for enforcement. The petition for
24 enforcement has the affidavit of Mr. Sprague attached
25 to it, and attached to that is an Exhibit F, which is

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1 a series of e-mails.

2 JUDGE CAILLE: Did you give an exhibit
3 number on that to the -- you're talking to the
4 petition?

5 MS. ANDERL: The petition has an affidavit
6 attached. The petition's pretty short, it's only
7 about eight or 10 or 12 pages long.

8 JUDGE CAILLE: Yes, and attachment --

9 MS. ANDERL: And then the affidavit of Ethan
10 Sprague, and then there is an Exhibit F attached to
11 that.

12 JUDGE CAILLE: Yes.

13 MS. ANDERL: Which are e-mails. And if you
14 turn -- let's see. There's one e-mail. And across
15 the top, it says page one of three. Skip that one
16 and go to the e-mail messages that start with page
17 one of six.

18 JUDGE CAILLE: I'm there.

19 MS. ANDERL: Okay. On the bottom of page
20 one, you can see, where it says, Original message
21 from Dan Holt to Ethan Sprague, dated January 12th,
22 2005, and if you follow that, that's one long message
23 string, and if you get to page four, the second full
24 paragraph states, Qwest response.

25 And Your Honor, just so you understand,

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1 this, on e-mail, was actually done in three colors.
2 I believe there's red, blue and green. And in this
3 case, Qwest had interlineated its response to an
4 e-mail that Pac-West had originally sent, so to --
5 not only is it defined by Qwest's response, but in
6 real life, it is also in a different color, so you
7 can read it.

8 But the message there is that Qwest is
9 processing the December payment and will include the
10 appropriate dispute identification for that portion
11 withheld for VNXX and non-Qwest originated traffic,
12 which is -- non-Qwest originated traffic is
13 transiting type traffic where another carrier
14 originates the traffic and it is carried over Qwest's
15 network for termination to Pac-West. But Qwest is
16 not responsible for those minutes; the originating
17 carrier is responsible for those minutes.

18 And so that is the 20 -- the additional 20
19 percent of the minutes. And you know, we didn't,
20 until we saw this brief, realize that Pac-West would
21 claim to not understand that there was an additional
22 dispute in addition to the VNXX. I don't think that
23 that's necessarily before you to decide today, but we
24 did want it to be clear that there are two
25 components, and the minutes of use attributable to

0063

1 VNXX are kind of a subset of the overall disputed
2 minutes that we feel are needing to be decided
3 between the companies, but that those minutes may not
4 -- really aren't properly teed up in the petition, as
5 far as we're concerned.

6 JUDGE CAILLE: Right.

7 MS. ANDERL: Your Honor, I'm available for
8 any questions that you may have, but --

9 JUDGE CAILLE: Let me just check my notes
10 for a second, and then we'll hear from you again, Mr.
11 Kopta.

12 I think I've covered all the questions I had
13 made notes on. Let's see. Yes, all right. Mr.
14 Kopta.

15 MR. KOPTA: Thank you, Your Honor. A couple
16 of responses. First of all, I want to point out
17 that, in the two prior arbitrations before the
18 Commission, in the CenturyTel-Level 3 arbitration,
19 Level 3 was only asking for bill and keep because,
20 under the FCC ISP Remand Order, Level 3 was entering
21 into a market in which it previously had not
22 exchanged traffic and, therefore, under the FCC ISP
23 Remand Order, bill and keep was the only type of
24 compensation that was available. That's not the case
25 with Pac-West.

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1 With respect to AT&T, again, we discussed
2 that in terms of that was a suggested way of
3 resolving the parties' dispute. It wasn't something
4 that the Commission established. In fact, quite to
5 the contrary.

6 Ms. Anderl raises the, I'm sure, less than
7 hyperbolic question of why have local telephone
8 numbers at all if we're going to allow what we
9 believe is foreign exchange service. Even under Ms.
10 Anderl's scenario, with four different telephone
11 lines, with different local numbers in each of those
12 local calling areas, you're still talking about a
13 customer that would have to pay for four lines coming
14 into their house. If the customer were Qwest's,
15 they'd have to pay for a dedicated circuit between
16 its serving central office and the serving central
17 office in the local calling area.

18 And with respect to Pac-West, if Pac-West
19 were to do that, then there would be a rate that
20 would be commensurate with the type of service that
21 was provided. So we're not talking about something
22 that is going to be remotely likely unless Ms. Anderl
23 has party line calls with all four of her friends 24
24 hours a day.

25 And to that point, I think Ms. Anderl

0065

1 mischaracterizes Pac-West's service offering.
2 Pac-West incurs very real costs, including cost of
3 its switch, the cost of its network, the cost of the
4 special access facilities that it obtains from Qwest
5 to reach into these local calling areas to bring
6 traffic back. All of those costs needs to be
7 recovered in Pac-West's rates or Pac-West loses
8 money.

9 Pac-West certainly does not want to lose
10 money and certainly would not price its services in
11 order to lose money, so this isn't a situation in
12 which customers get FX feature functionality for
13 free. Rather, it is part of the costs that go into
14 the service that is provided. So whether or not it's
15 a separate charge is irrelevant. Those costs are
16 included in the rates that Pac-West's customers pay.

17 And of course there's no basis in the record
18 to assume that Pac-West makes any payments to ISPs.
19 Qwest seems to think that reciprocal compensation is
20 some kind of a windfall for Pac-West, but if you look
21 at the rates that Qwest charges for local
22 interconnection contained in its SGAT, Statement of
23 Generally Available Terms, an end office termination
24 is .0011, so 11 one-hundredths of a cent. And those,
25 according to Qwest, are Qwest's costs, plus the

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1 reasonable profit that's permitted under the Act.
2 So if Qwest switches a call at its end office, that's
3 how much cost Qwest incurs.

4 The rate for ISP-bound traffic under the
5 FCC's ISP Remand Order is .0007, or seven
6 one-hundredths of a cent. So with the assumption
7 that Pac-West's costs for switching are the same as
8 Qwest's costs, which is the operating assumption for
9 reciprocal compensation purposes, Pac-West is
10 actually receiving less than its costs for
11 terminating ISP dial-up traffic.

12 So this is a question of Pac-West recovering
13 its costs, not generating some kind of a windfall.

14 We also dispute Ms. Anderl's claim that 65
15 percent of Pac-West's traffic or business, whichever
16 she was referring to, is FX ISP-bound traffic.
17 Number one, there's nothing in the record to support
18 that. She talks about Qwest having knowledge of
19 certain trunk groups. That's not in the record, I
20 have not seen it, so we don't think that there's any
21 basis for the Commission to make any kind of a
22 finding on that.

23 Second of all, the fact that there's local
24 calling going in one direction may mean that there's
25 ISP dial-up or it may mean that it's another customer

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1 that has exclusively inbound calling. So at this
2 point, we just don't know.

3 The other misleading thing that Ms. Anderl
4 was pointing out in this regard is that Qwest's FX
5 service accounts for three-tenths of one percent of
6 Qwest's access lines in Washington.

7 What we're talking about here is minutes of
8 use. Giving her example of an airline reservation
9 center as the typical FX customer, I don't think it's
10 too far outside the pale to say that that type of
11 customer probably gets a lot of telephone calls. So
12 we don't know what percentage of Qwest's overall
13 traffic is destined for its FX customers, which would
14 be a more appropriate comparison.

15 Certainly, if we look at the number of
16 Pac-West access lines in Washington, they have less
17 than one percent of the number of access lines that
18 Qwest has. So if Qwest has three-tenths of one
19 percent in FX, then we're talking about a comparison
20 in which we're dealing with roughly the same type of
21 numbers.

22 Qwest has a lot more customers, but in terms
23 of traffic, I don't think that Qwest can say that
24 it's some minuscule amount or that somehow Pac-West
25 is turning an exception into the rule.

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1 Ms. Anderl also characterizes its market
2 expansion line, or MEL product, as two telephone
3 calls. That may be a creative way of constructing
4 this call from a network perspective, but from
5 Pac-West's perspective, in delivering a call from its
6 customer to the Qwest MEL customer, that telephone is
7 off hook and is continued to be carried as a local
8 call for Pac-West, and compensation that Pac-West is
9 paying to Qwest for the duration of apparently both
10 of those telephone calls, even though the ultimate
11 destination of the call is outside the local calling
12 area.

13 And it struck me, as Ms. Anderl was
14 describing this product, that she was virtually
15 describing EAS bridging, which she uses in her brief,
16 as two telephone calls, one into the -- one EAS area
17 and another from that one into another EAS area. So
18 I guess, in that circumstance, it's something the
19 Commission shouldn't allow, and yet, when Qwest does
20 it, it's something that the Commission should allow.

21 Now, Qwest, again, emphasizes that the
22 customer pays toll charges, its customer pays toll
23 charges, but, again, I would emphasize that, from
24 Pac-West's perspective, we are paying reciprocal
25 compensation, not getting access. So from our

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1 perspective, it's irrelevant what Qwest gets from its
2 customer. Whether it gets toll charges, whether it
3 gets its local rates or whether it does it for free
4 is irrelevant, from our perspective.

5 Qwest also discusses that dedicated
6 facilities is one of the major differences between
7 our FX service and Qwest's FX service. Again, from
8 our perspective, or from the perspective of the
9 carrier whose customer is calling the foreign
10 exchange customer, that doesn't make any difference.

11 If we look at the example that, again, the
12 illustration, Pac-West has dedicated facilities
13 between its switch and a Qwest end office and a local
14 calling area. No portion of that facility is
15 dedicated to any one customer, but part of that
16 facility is used to carry traffic to a particular
17 customer, and the costs of that facility are included
18 in Pac-West's rates.

19 The fact that it's not dedicated to that
20 particular customer is irrelevant, because, again,
21 the customer pays through its rates for that
22 dedicated facility that goes into the local calling
23 area, which segues into Qwest's point that cheap
24 dial-up is not good if Qwest subsidizes it. Qwest is
25 not subsidizing Pac-West's services.

0070

1 Pac-West -- for a majority of traffic, Qwest
2 is switching that once at the serving wire center,
3 the serving central office for its subscriber and
4 handing it off at that central office to Pac-West.
5 That's the extent of the costs that Qwest incurs.
6 Qwest pays compensation at the ISP rate, but that
7 goes to recover Pac-West's -- part of Pac-West's
8 switching costs. And if this were an exchange in
9 which Qwest had two different switches, and the
10 customer, when making a local call across town, for
11 example, from my home to downtown Seattle, served by
12 two different central offices, Qwest would be
13 incurring switching costs at both my serving central
14 office and the serving central office of the number
15 that I dialed, and may actually also be incurring
16 tandem switching charges.

17 So Qwest, in many ways, in many
18 circumstances, is paying less to hand this call off
19 to us, including the compensation that it pays, than
20 it would if it were to carry it on its own network.

21 State authority. I disagree with Ms.
22 Anderl's characterization that the examples of states
23 that have per minute compensation or required
24 compensation rules are outliers. The following
25 states have issued arbitration decisions in which

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1 they have essentially agreed with Pac-West: New York,
2 Michigan, Connecticut, North Carolina, Virginia, per
3 the FCC Wireline Chief, Maryland, and California.
4 Those are not outliers. That's a significant number
5 of states, more than the number of states that Qwest
6 cites in its brief, if we want to play numbers. And
7 in terms of importance, certainly New York and
8 California, with very large populations, are not
9 insignificant states.

10 So it goes both ways. Commissions wrestle
11 with this issue, but there are a significant number,
12 including the FCC Wireline Competition Bureau, that
13 agree with Pac-West.

14 Finally, I just want to clarify that
15 Pac-West is not going back and forth on its
16 definition of the type of ISP-bound traffic or
17 presumed ISP-bound traffic for which it is seeking
18 compensation. It is locally-dialed ISP-bound
19 traffic.

20 We agree that if you were to call the
21 Seattle number of an ISP, that toll charges would
22 apply, because that's the numbering convention.
23 That's what Pac-West is advocating. Numbering
24 convention is how the industry rates and routes
25 calls, and that's what we are advocating be the basis

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1 for determining when reciprocal compensation or
2 ISP-bound traffic, presumed ISP-bound traffic
3 compensation applies.

4 That's it. Thank you.

5 JUDGE CAILLE: Thank you very much. And
6 I'll be starting to work on a decision.

7 MS. ANDERL: Thank you, Your Honor.

8 JUDGE CAILLE: I just wanted to verify with
9 the parties, is it August 23rd? Is that the deadline
10 for a decision?

11 MS. ANDERL: I believe that's the date that
12 was established at the pre-hearing conference.

13 JUDGE CAILLE: Okay. All right.

14 MS. ANDERL: If there's a need for a
15 different date, I think we're certainly flexible.

16 JUDGE CAILLE: Okay.

17 MR. KOPTA: We'll give you to the 24th.

18 JUDGE CAILLE: All right. Well, I'll be in
19 Chicago on the 24th, so it will be the 23rd. All
20 right. Thank you very much.

21 MR. KOPTA: Thank you, Your Honor.

22 JUDGE CAILLE: I appreciate your time and
23 efforts on this, and now it's in my court. Thank
24 you.

25 MS. ANDERL: Thank you.

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MR. KOPTA: Thank you.

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(Proceedings adjourned at 11:21 a.m.)

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