BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

QWEST CORPORATION, Complainant, v. LEVEL 3 COMMUNICATIONS, LLC, *et al.*, Respondents.	)	DOCKET UT-063038 PAC-WEST PETITION FOR ADMINISTRATIVE REVIEW OF ORDER 02 INITIAL ORDER (Oral Argument Requested)

1. Pursuant to WAC 480-07-825, Pac-West Telecomm, Inc. ("Pac-West") submits this Petition for Administrative Review of Order 02 Initial Order ("Initial Order"). Pac-West further requests that the Commission hear oral argument on this Petition in light of the important and complex public policy issues raised by this proceeding.

PETITION

2. Pac-West challenges the following findings of fact and conclusions of law in the Initial Order:

(1) "VNXX calls are calls made using telephone numbers that appear to be local but are in reality non-local or interexchange calls" (Finding of Fact (4));

(2) "Respondents use VNXX calling arrangements for their customers without paying compensation that reflects the non-local, or interexchange, characteristics of VNXX calls" (Finding of Fact (5));

(3) "Bill and keep, or zero compensation, is the appropriate, fair, just and reasonable compensation system between CLECs and Qwest for VNXX calls" (Finding of Fact (6));

(4) "VNXX traffic makes use of Qwest's local interconnection service (LIS) trunks without compensating Qwest for the use of those trunks" (Finding of Fact (7));

(5) "The appropriate compensation for transport of VNXX calls over Qwest's LIS trunks is the TELRIC trunking rate" (Finding of Fact (8)); and

(6) "VNXX calls have the characteristics of interexchange, non-local calls and are permissible only if bill and keep intercarrier compensation is applied to such calls and only if CLECs compensate Qwest for transport of such calls at TELRIC rates" (Conclusion of Law (3)).

Pac-West further challenges various points raised – or erroneously ignored – in the discussion portion of the Initial Order that relate to these findings of fact and conclusions of law, as discussed more fully in the Discussion section below.

3. Pac-West, moreover, proposes that, to the extent the Commission addresses issues beyond those raised in Qwest's complaint, the Commission render findings of fact and conclusions of law that are consistent with the direction given the Commission by the federal District Court on remand of Qwest's appeal of the Commission decisions in Docket Nos. UT-053036 and UT-053039.[1] More specifically, the Commission should ensure that its analysis and conclusions on the nature and treatment of foreign exchange ("FX") or "VNXX" service, at least with respect to serving Internet Service Providers

[1] *Qwest v. WUTC*, 484 F. Supp. 2d 1160, 1177 (W.D. Wash. 2007).

("ISPs"), either address the requirements of federal law as determined by the District Court, or do not preclude the parties and the Commission from fully addressing those requirements in the separate remand proceedings.

DISCUSSION

A. The Commission Should Dismiss Qwest's Complaint without Undertaking a Generic Inquiry of "VNXX" Service.

4. This docket is not, and never has been, a generic inquiry into intercarrier compensation issues. Rather, this proceeding is a complaint case, originated by Qwest Corporation ("Qwest"), challenging the legality of the FX or FX-like services provided by certain competitive local exchange companies ("CLECs"), including Pac-West. Qwest summarized the allegations in its complaint as follows:

> In this complaint, Qwest contends that VNXX numbering arrangements for routing traffic are unlawful and contrary to the public interest and public policy of the state. Qwest asks the Commission for a ruling that carriers engaged in or using such numbering arrangements, including Respondents, are in violation of state law, Qwest's tariffs, and prior Commission orders. Qwest asks the Commission to order that such arrangements are prohibited in the state of Washington, and that Respondents must cease and desist such arrangements immediately, or pay appropriate access charges for the traffic being routed via VNXX.[2]

5. The Initial Order correctly concludes that "Qwest has not met its burden to show that VNXX service per se is illegal."[3] The Commission, therefore, should dismiss the Complaint and take no further action.

6. The Initial Order, however, states, "Having found that VNXX service per se is not illegal, the Commission must also determine whether there are public interest concerns

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[2] Qwest Complaint ¶ 12.

[3] Initial Order ¶ 55.

that mandate either outright prohibition or some form of limitation."[4] The Initial Order identifies no legal basis on which the Commission may substantially expand the scope of a complaint on its own motion long after the evidentiary hearings have concluded. Order 01, the Prehearing Conference Order and Notice of Hearing, does not give any indication that issues other than those raised in Qwest's complaint would be considered. The Initial Order thus departs from accepted principles of administrative law by reaching issues that were not raised in the complaint or that were not otherwise established prior to the hearing as matters to be considered by the Commission.[5]

7. The Initial Order offers two justifications for expanding the scope of this docket. The Initial Order first contends that "the Commission itself suggested that Qwest might file a complaint that would explore the ramifications of VNXX. Qwest filed this case on that basis."[6] The Commission's suggestion, however, is irrelevant. Qwest framed its complaint as a challenge to the legality of "VNXX" provisioning of FX service, and that complaint, not a Commission suggestion in an order in a separate docket, determines the scope of this proceeding.

8. The Initial Order's second purported justification for broadening the issues in this docket is that

> Qwest couched most of its allegations about the legality of VNXX is terms of what compensation for the use of VNXX was appropriate. The CLECs and Staff have responded at length about the compensation issues. The

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[4] *Id.* ¶ 56.

[5] *See, e.g.,* RCW 34.05.434 (requiring notice of hearings of agency adjudicative proceedings include "A short and plain statement of the matters asserted by the agency," "a statement of the issues involved," or "a copy of the initiating document").

[6] Initial Order ¶ 56, n.57.

> parties have created a record that allows the Commission to move forward to a resolution in this proceeding.[7]

Qwest's complaint is not reasonably susceptible to this interpretation. Qwest pointedly and repeatedly alleged that the Respondent CLECs are violating Qwest tariffs, industry numbering guidelines, state statutes, and interconnection agreements by providing interexchange calls without payment of access charges. Nothing in these allegations gives rise to the issue of the form and level of intercarrier compensation that should apply if the Commission finds that "VNXX" is *not* unlawful. Staff addressed this issue in its direct testimony, which compelled CLECs to respond, but no party can expand the scope of the issues in a complaint case simply by filing testimony. Whether or not sufficient evidence exists in the record to support a generic determination on intercarrier compensation – which it does not, as discussed further below – that issue remains beyond the scope of Qwest's complaint and the notice of hearing and should not be addressed in this proceeding.

9. The Initial Order, moreover, is internally inconsistent. While stating that "[t]he parties have created a record that allows the Commission to move forward to a resolution in this proceeding," the Initial Order also repeatedly points to the lack of evidence on critical points, including the costs of exchanging "VNXX" traffic[8] and the extent to which usage of Qwest's FX and FX-like services is as extensive (and thus raises the same alleged concerns) as "VNXX" service.[9] The Initial Order's reliance on assumptions,[10]

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[7] *Id.*

[8] *E.g.*, Initial Order ¶ 64.

[9] *Id.* ¶ 72, n.70.

[10] *Id.* ¶ 65.

rather than record evidence, is arbitrary and capricious and undermines the very justification the Initial Order gives for expanding the scope of this proceeding. If the Commission wants to investigate intercarrier compensation issues arising from *all* FX and FX-like services provided by *all* local exchange carriers ("LECs"), the Commission should initiate an appropriate proceeding to do so. The Commission should not expand the scope of a Qwest complaint into the legality of "VNXX" service after the evidentiary hearings have concluded and attempt to make determinations about intercarrier compensation for "VNXX" service in isolation based on a limited and inadequate factual record.

B. The Record and Applicable Law Do Not Support the Initial Order's Factual Findings and Conclusions of Law With Respect to Intercarrier Compensation for "VNXX" Traffic.

10. Even if the Commission decides to expand the scope of this docket beyond the issues raised in Qwest's complaint – which it should not – the Initial Order erred both in considering intercarrier compensation for "VNXX" traffic in isolation from other FX or FX-like services and in the findings and conclusions on that isolated issue. The Initial Order states several different reasons scattered throughout the body of the order for adopting bill and keep for "VNXX" service. None of these reasons are supported in the record or are consistent with the law.

1. The Initial Order Fails to Undertake the Required Legal Analysis of Federal Law on Intercarrier Compensation.

11. The federal Telecommunications Act of 1996 ("Act") imposes the duty on all LECs to "establish reciprocal compensation arrangements for the transport and

termination of telecommunications."[11] The Act, however, provided an exception to that requirement for "exchange access, information access, and exchange services for such access [provided] to interexchange carriers and information service providers," which LECs are obligated to provide under the same compensation obligations that existed immediately prior to passage of the Act until those obligations are explicitly superseded by the FCC.[12] The Act thus establishes two types of telecommunications traffic: (1) Section 251(g) traffic – exchange or information access, *e.g.*, switched access provided to interexchange carriers ("IXCs"), which is subject to access charges; and (2) Section 251(b)(5) traffic, or all other forms of telecommunications traffic, which are subject to reciprocal compensation. The FCC established ISP-bound traffic as a third traffic type, although the FCC has yet to provide a judicially acceptable legal basis for doing so, and prescribed a reduced level of compensation for such traffic.[13]

12. The Initial Order does not include "VNXX" traffic in any of these categories. Rather, the Initial Order essentially categorizes "VNXX" as its own unique form of telecommunications traffic that is to be exchanged without compensation. The Act, however, does not authorize the Commission to create its own exemption from the reciprocal compensation requirements in Section 251(b)(5). "VNXX" is not exchange access as provided to IXCs prior to February 1996 as established under Section 251(g),[14] and thus must be considered Section 251(b)(5) traffic (or ISP-bound traffic, as

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[11] 47 U.S.C. § 251(b)(5).

[12] *Id.* § 251(g).

[13] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 F.C.C. Rcd 9151, 2001 WL 455869 (Apr. 27, 2001) ("*ISP Remand Order*").

[14] *E.g.*, Joint CLEC Opening Brief ¶¶ 20-21.

applicable) subject to reciprocal compensation. The Initial Order erred in failing to analyze intercarrier compensation for the exchange of "VNXX" traffic under the provisions of Section 251 of the Act.

13. Parties who defend the Initial Order may contend that such error is one of harmless omission because the Initial Order established bill and keep as the intercarrier compensation mechanism and the Act expressly authorizes the Commission to determine the appropriate reciprocal compensation charges under Section 252(d)(2), including "arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)."[15] There are several problems with that rationale.

14. First, the Initial Order made no such conclusion of law. The Commission should expressly state and explain the authority under which it is acting, not attempt to rely on post hoc justifications.

15. Second, Section 252(d)(2) of the Act requires that reciprocal compensation for Section 251(b)(5) traffic be based on cost. The record contains no such evidence. Indeed, as discussed further below, the Initial Order notes the lack of evidence on the costs incurred to transport and terminate "VNXX" traffic,[16] much less how any such costs are sufficiently distinguishable from other types of Section 251(b)(5) traffic to justify a different level of compensation.

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[15] 47 U.S.C. § 252(d)(2)(B)(i). Those parties might also claim that the Initial Order effectively categorized "VNXX" traffic as Section 251(g) intrastate "exchange access" for which the Commission has authority to establish compensation levels, including bill and keep, but Pac-West explained in post-hearing briefing that "VNXX" cannot be considered "exchange access" under Section 251(g) because FX service has never been considered exchange access in Washington, "VNXX" as applied to ISPs does not predate the Act, and FX or "VNXX" service is not provided to IXCs. *See, e.g.*, Joint CLEC Opening Brief ¶¶ 20-21; *WorldCom, Inc. v. FCC*, 288 F.3d 429, 433-34 (D.C. Cir. 2002).

[16] Initial Order ¶ 64.

16. Third, this proceeding is neither an interconnection agreement arbitration nor a cost docket, the only two types of proceedings in which the Commission has engaged, and is authorized to engage, in making costing and pricing determinations under the Act. The Ninth Circuit has made clear that a state commission cannot issue a generic ruling on the nature of, and appropriate level of intercarrier compensation for, exchanged traffic that is binding on all CLECs with interconnection agreements,[17] which is precisely what the Initial Order does.

17. Finally, the Initial Order appears to impose bill and keep on "VNXX" retroactively, denying CLEC counterclaims because those parties did not satisfy their burden to prove that the traffic for which they billed Qwest months or years ago is not "VNXX" and thus subject to compensation.[18] Nothing in the Act authorizes retroactive application of Commission cost determinations, and the Commission has consistently applied new intercarrier compensation rates only prospectively.

18. The Commission must comply with federal law, and federal law establishes the requirements for determining intercarrier compensation for the exchange of telecommunications traffic. The Commission, therefore, should analyze "VNXX" under the reciprocal compensation provisions of the Act and should treat "VNXX" traffic the same as all other types of Section 251(b)(5) traffic for compensation purposes unless and until Qwest or another party establishes in a cost docket or interconnection agreement arbitration that the costs to transport and terminate "VNXX" traffic justify a different level of compensation on a prospective basis.

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[17] *Pacific Bell v. Pac-West*, 325 F.3d 1114 (9th Cir. 2003).

[18] *E.g.*, Initial Order ¶ 138.

2. The Initial Order Is Anticompetitive and Discriminatory.

19. The Initial Order uses the term "VNXX" for ease of reference to refer to CLEC provisioning of "FX-like" services.[19] The Initial Order recognizes the Commission's prior determination that "VNXX" and FX services are "functionally equivalent" and concedes that "the Act may require that VNXX service be permitted as the competitive functional equivalent of FX service."[20] The Initial Order, however, addresses intercarrier compensation only for "VNXX" service and would require CLECs to terminate calls from Qwest subscribers to CLEC "VNXX" customers without compensation while leaving in place the requirement that CLECs compensate Qwest for calls CLECs' customers make to subscribers of Qwest FX and other FX-like services. On its face, such disparate intercarrier compensation for functionally equivalent services is discriminatory and anticompetitive in violation of federal and state law.[21]

20. The Initial Order does not even consider the impact of Qwest FX and FX-like services, much less offer any justification for treating "VNXX" service differently than other FX or FX-like services for intercarrier compensation purposes. The Initial Order dismisses any concerns about FX service because it "constitutes a relatively small number of Qwest's lines,"[22] but comparing Qwest's FX *lines* to "VNXX" minutes of use is a classic apples-to-oranges comparison. Even the Initial Order acknowledges that "[i]t is uncertain, however, how many minutes of use can be attributed to FX traffic."[23] The

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[19] Initial Order ¶ 13.

[20] *Id.* ¶ 77.

[21] *E.g.*, 47 U.S.C. § 252(d)(2); RCW 80.36.170 & 180.

[22] *Id.* ¶ 72.

[23] *Id.* n.70.

Joint CLECs demonstrated a reasonable possibility that such usage may be comparable to the level of "VNXX" usage[24] – evidence the Initial Order ignores.

21. Qwest, moreover, offers a market expansion line ("MEL") product that provides the same functionality as FX service – permitting the MEL customer to receive "local" calls in a local calling area where the customer is not physically located. Qwest has far more MEL access lines than FX lines, but like its FX service, Qwest does not track the minutes of use of its MEL subscribers,[25] which may be just as substantial as the level of "VNXX" traffic. CLECs, however, must pay reciprocal compensation to Qwest of $0.001178 (or approximately $0.0018 for calls delivered to the Qwest tandem)[26] for calls that its customers make to Qwest MEL subscribers with telephone numbers rated to the same local calling area, as well as the transport costs (monthly recurring charges for DS1 transport of $33.12 plus $0.51 to $2.70 per mile depending on the distance)[27] to get those calls from the CLEC switch to the Qwest serving wire center. CLECs under the Initial Order, on the other hand, would be required to terminate calls from Qwest customers to CLEC "VNXX" customers without any compensation *and* would be required to *pay Qwest* the transport costs to get those calls to the CLEC switch from the Qwest serving wire center. The Initial Order improperly fails to consider these facts.

22. Qwest also provides local service to an affiliate who provides voice over Internet protocol ("VoIP") services – including the assignment of telephone numbers in Washington local calling areas to persons who are physically located in other states,

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[24] *See* Joint CLEC Opening Brief ¶ 48 and record evidence cited therein.

[25] Ex. 59 (Qwest response to Pac-West Data Request No. 29).

[26] *E.g.*, Qwest Statement of Generally Available Terms ("SGAT"), Exhibit A, Section 7.6.

[27] *E.g.*, *id.*, Section 7.3.

much less other local calling areas in this state.[28] The record is devoid of evidence on the amount of usage represented by the Qwest affiliate for this FX-like service or whether CLECs must pay reciprocal compensation to Qwest for the calls their customers make to the Qwest affiliate customer. Staff acknowledged that its proposal does not address VoIP traffic but that the Commission should consider that issue in a separate docket.[29] The Initial Order says nothing about this issue.

23. The Commission cannot reasonably establish intercarrier compensation for "VNXX" service without simultaneously considering intercarrier compensation for other FX and FX-like services. By reviewing "VNXX" intercarrier compensation in isolation and altering the status quo only for "VNXX," the Initial Order establishes a scheme that is discriminatory and anticompetitive in violation of Washington and federal law.

3. Traffic Imbalance and Alleged Arbitrage Opportunities Do Not Justify Imposing Bill and Keep on "VNXX" Traffic.

24. The Initial Order expressly adopts a modification of Staff's bill and keep and transport charge proposal (modified only to extend the proposal to voice, as well as ISP-bound, "VNXX" service) based on "traffic imbalance," "skewed" intercarrier compensation, and (with respect to transport) parity with Qwest FX service:

> Staff's proposal that the Commission adopt bill and keep as the compensation mechanism for VNXX ISP-bound traffic in this proceeding offers a fair, just, and reasonably balanced resolution to the traffic imbalance problems and skewed intercarrier compensation, described above, that result from VNXX service. Under Staff's proposal, CLECs do not have to pay access charges and Qwest does not pay reciprocal compensation for originating or terminating VNXX traffic. Moreover, regarding compensation for

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[28] *E.g.*, TR. at 353-54 (Qwest Brotherson).

[29] TR. at 469-73 (Staff Williamson).

> transporting VNXX calls, the Commission believes that requiring CLECs to pay for the transport of such calls is fair and reasonable based on the comparison of VNXX service to Qwest's FX service, under which the FX customer pays for transport of the FX call.[30]

None of these factors justify the Initial Order's conclusion.

25. Traffic imbalance and alleged arbitrage opportunities were the reasons cited by the FCC in its *ISP Remand Order* for establishing a reduced level of compensation for ISP-bound traffic. Even if the Commission had the authority to establish intercarrier compensation levels that are not based on cost (which it does not),[31] the FCC did not impose bill and keep for such traffic. The Initial Order apparently relies, in part, on some of the language in that FCC order, stating, "the *ISP Remand Order's* conclusions about regulatory arbitrage related to ISP-bound traffic and the FCC's rationale for moving toward a bill and keep compensation methodology for that traffic have not been repudiated."[32] The FCC, however, has never ordered bill and keep for ISP-bound traffic.[33] To the contrary, the FCC lifted the caps on growth of ISP-bound traffic in existing and new markets, effectively increasing the amount of traffic eligible for

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[30] Initial Order ¶ 97.

[31] *See* Discussion section B.1 above.

[32] *Id.* ¶ 96.

[33] The *ISP Remand Order* mandates compensation at $0.0007 per minute of use for ISP-bound traffic, a rate that remains in effect and is substantially lower than the TELRIC-based rates the Commission established for interconnection with Qwest of $0.001178 for end office termination and approximately $0.0019 for tandem termination. Qwest is therefore avoiding between $0.000478 and $0.0012 per minute on calls its customers send to a CLEC serving ISPs. The significantly lower rate CLECs receive for terminating ISP-bound traffic thus already takes into account the traffic imbalance and arbitrage concerns raised in the Initial Order. Moreover, any requirement that CLECs should bear an increased burden to transport this traffic from the local calling area, instead of from a single POI per LATA, should more than alleviate any concern that requiring Qwest to pay the FCC ISP rate on "VNXX" traffic is inequitable.

compensation, based on its finding that the rationale it expressed in the *ISP Remand Order* no longer required such traffic to be excluded from compensation.[34]

26. The Initial Order does not even attempt to explain why the Commission should impose bill and keep on predominantly ISP-bound traffic when the FCC has refused to do so. In fact, the very same traffic at issue here was before the FCC in the *Core Forbearance Order*. As Pac-West pointed out in its separate enforcement petition proceeding against Qwest, Qwest never raised the "VNXX" issue until after the FCC lifted the growth and new market caps on compensation for ISP-bound traffic, and not coincidentally, Qwest contended that the ISP-bound traffic in excess of the former caps was noncompensable "VNXX" traffic.[35] The Initial Order cites to no evidence in the record that traffic imbalance and arbitrage are worse in Washington than in the evidence provided to the FCC. Indeed, the record is devoid of evidence that any such market distortions exist in Washington at all. Even the Initial Order recognizes that the record unambiguously demonstrates that the amount of ISP dial-up traffic in Washington "is at the very least in stasis or declining."[36] Traffic imbalance and arbitrage opportunities thus are phantom concerns that are unsupported by record evidence.

27. The Initial Order's rationale for requiring CLECs to pay for transport of "VNXX" traffic they terminate falls equally wide of the mark. The fact that Qwest FX subscribers pay for transport on Qwest's side of the POI is irrelevant. The Initial Order, like Qwest, confuses the *retail* service provided by the carriers to their customers with the *wholesale*

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[34] *Petition of Core Communications, Inc. for Forbearance under 47 § U.S.C. 160(c) from Application of the ISP Remand Order*, WC Docket No. 03-171, Order (rel. Oct. 18, 2004) ("*Core Forbearance Order*").

[35] *Pac-West v. Qwest*, Docket No. UT-053036, Affidavit of Ethan Sprague ¶¶ 6-13 (June 6, 2005); *id.*, Pac-West Opposition to Qwest Petition for Reconsideration ¶ 1 (Mar. 13, 2006).

[36] Initial Order ¶ 78.

interconnection service that the carriers provide to each other. A CLEC must pay for the transport to get its customers' calls to the Qwest switch that serves the local calling area to which the telephone numbers of the Qwest customers receiving the calls are assigned. The same is true of Qwest – Qwest must pay to transport its customers' calls to the CLEC switch that serves the local calling area to which the telephone numbers of the CLEC customers receiving the calls are assigned. The network facilities required to get the call from the terminating carrier's switch to its customers receiving the calls – and who pays for those facilities and how much – have no bearing whatsoever on the amount of transport required to deliver the calls to the terminating carrier's switch or which carrier pays for that transport.[37]

28. The Initial Order's comparison of retail FX service to wholesale interconnection service, moreover, is not only inappropriate, it stands in sharp contrast to the Initial Order's failure to compare intercarrier compensation for retail FX service and retail "VNXX" service – a comparison that is not only appropriate but necessary to ensure nondiscrimination. The record thus fails to support the Initial Order's stated rationale for imposing bill and keep and additional transport payments onto carriers providing "VNXX" service.

4. Washington Statutes Do Not Require Bill and Keep for "VNXX" Service.

29. In addition to its stated rationale, the Initial Order also purports to justify its application of bill and keep to "VNXX" traffic by concluding that such service would violate Washington statutes if intercarrier compensation does not reflect that "VNXX"

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[37] *E.g.*, Ex.501T (Pac-West Sumpter Response) at 9.

service "effectively uses Qwest's local exchange network to provide a service that has long distance calling as one of its characteristics":

> As much as VNXX calls may be the functional equivalent of FX calls, they also bear characteristics of long distance calls and the intercarrier compensation applied to them must fairly reflect that fact or risk violation of the statutes Qwest cites. For example, RCW 80.36.080 requires that rates and tolls be reasonable. RCW 80.36.140 provides that if the Commission finds that practices of a telecommunications company are unjust or unreasonable, the Commission must determine what is just and reasonable. Under RCW 80.36.160, the Commission may prevent arbitrary and unreasonable practices with regard to the use of toll facilities. Each of these statutes bears directly on VNXX service, which effectively uses Qwest's local exchange network to provide a service that has long distance calling as one of its characteristics. Without proper compensation to Qwest for this use, VNXX service is unreasonable and violates Washington statutes.[38]

30. Taken on its face, this statement applies equally to all FX and FX-like services, all of which "bear characteristics of long distance calls" but all of which currently are subject to the same type of compensation that applies to calls between parties who are physically located in (and have telephone numbers rated to) the same local calling area. Qwest's FX service, MEL service, and call termination for its VoIP affiliate, like VNXX, enable non-toll calling between parties who are not physically located in the same local calling area. If payment of compensation to "VNXX" service providers violates Washington statutes, so would payment of compensation to Qwest for its FX and FX-like services.

31. More fundamentally, however, the Initial Order does not explain how provisioning of "VNXX," but not other FX or FX-like services, would run afoul of state

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[38] Initial Order ¶ 47.

law if subject to the same type of compensation applicable to other locally-dialed traffic. "VNXX" does not use any portion of Qwest's toll network and uses the same portion of Qwest's local exchange network as any other "local" call. Qwest has maintained that the same thing is true of toll providers who use Qwest's network to originate long distance calls, but as discussed above, FX and FX-like calls have historically been treated as "local" calls for intercarrier compensation purposes in Washington. The Initial Order provides no basis – and no basis exists – for interpreting Washington statutes any differently for "VNXX" service than for any other FX or FX-like service.

5. The Initial Order Misconstrues the AT&T Arbitration Order and CLEC Local Calling Areas.

32. The Initial Order appears to attempt to draw support for its conclusions on the Commission's decision in the last interconnection agreement arbitration between Qwest and AT&T and the Initial Order's belief that a quid pro quo is required for permitting CLECs to have expanded local calling areas:

> The Commission ultimately approved bill and keep as the form of intercarrier compensation applied to AT&T's VNXX services that were "functionally identical to services Qwest now offers to foreign exchange customers and for internet access." Therefore, while the interconnection agreements do not prohibit VNXX service, they point up the dichotomy between allowing CLECs their broader local calling areas and yet maintaining Qwest's local calling areas as the basis for call billing. The CLECs cannot escape the fact that VNXX calls, even though locally dialed, are not locally terminated. Under the interconnection agreements, compensation for VNXX service must reflect that fact.[39]

[39] Initial Order ¶ 54 (footnote omitted).

The Initial Order misinterprets the Commission's final order in the AT&T arbitration and its meaning.

33. The Commission did not impose bill and keep compensation on AT&T's provision of FX or FX-like services. While the arbitrator opined that "[s]uch traffic should be compensated on a bill-and-keep basis,"[40] the Commission did not adopt that portion of the arbitrator's opinion. The Commission affirmed the arbitrator's decision to use Qwest's definition of "Exchange Service" while permitting AT&T to offer FX and Internet access telephone numbers, but the Commission refused to impose any conditions on the parties' implementation of that decision, including imposition of bill and keep for FX traffic:

> We approve of the Arbitrator's efforts to encourage the parties to avoid such potential disputes by further negotiation, if necessary, to ensure implementation of their Interconnection Agreement in a manner consistent with the pro-competitive principles discussed in the Arbitrator's Report. 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.[41]

The Initial Order, therefore, errs in its interpretation of the Commission's Final Order in the AT&T arbitration.

34. Nothing in the Commission's Final Order in the AT&T arbitration, moreover, gives rise to any conclusion that the result is a broader local calling area for CLECs than for Qwest. FX and FX-like services, including "VNXX" service, do not broaden the

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[40] *In re Petition for Arbitration of AT&T and TCG Seattle with Qwest*, Docket No. UT-033035, Order No. 04, Arbitrator's Report ¶ 35 (Dec. 1, 2003).

[41] *Id*, Order No. 05, Final Order ¶ 16.

local calling area. Such services permit a customer to obtain a presence within the existing local calling area when the customer is physically located outside that area. All FX and FX-like calls, in the words of the Initial Order, "even though locally dialed, are not locally terminated." The FCC has also determined that the same is true for all ISP-bound calls. This Commission, however, has never determined that "[u]nder interconnection agreements, compensation for VNXX service must reflect that fact" as the Initial Order states, and the Commission has no basis for making such a determination in this proceeding.

6. The Limited Cost Evidence in the Record Does Not Support Imposition of Bill and Keep on "VNXX" Service.

35. The Initial Order correctly finds little cost evidence in the record but nevertheless makes assumptions about the costs incurred to transport and terminate "VNXX" traffic and relied on those assumptions, in part, to impose bill and keep and transport costs on carriers who provide "VNXX" service:

> As discussed above, the parties provided little hard evidence about the actual costs attributable to carrying VNXX ISP-bound calls. . . .
>
> Nevertheless, based on the record before it, the Commission can make some reasoned assumptions about costs. For example, it is reasonable to assume that Qwest incurs some additional costs for transporting VNXX calls to CLEC points of interconnection over Qwest's Local Interconnection System (LIS) trunks, and it is reasonable to assume that CLECs may incur some costs related to terminating VNXX calls. These assumptions plus a variety of other factors constitute the basis for the Commission's approval in part of Staff's proposal, as discussed in section II.E.[42]

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[42] Initial Order ¶ 64-65.

The Commission should base its determinations on evidence, not "assumptions," as discussed above, and the "assumptions" in the Initial Order are either irrelevant to, or contradict, the Initial Order's intercarrier compensation findings and conclusions.

36. The Initial Order's first cost assumption is that "Qwest incurs some additional costs for transporting VNXX calls to CLEC points of interconnection over Qwest's Local Interconnection System (LIS) trunks." Qwest undeniably incurs costs to transport all calls that its customers make to CLEC customers, whether or not those CLEC customers subscribe to "VNXX" service. That assumption is meaningless. CLECs incur costs to transport the calls their customers make to Qwest customers, including subscribers to Qwest's FX and FX-like services. Each carrier recovers those costs from their own customers, not from the other carrier.[43] The Initial Order finds that "Qwest's reliance on the theory of cost causation, rather than actual evidence of costs incurred, underlying its claim that VNXX improperly deprives it of revenues is unconvincing."[44] The record amply supports that finding, which renders irrelevant any assumption about transport costs that Qwest incurs.

37. The Initial Order's other cost assumption is that "CLECs may incur some costs related to terminating VNXX calls." Again, CLECs unquestionably incur costs to terminate all calls to their customers, including customers who subscribe to "VNXX" service. The Commission has conducted no less than three cost dockets in which it examined the costs of end office and tandem switching and transport and established reciprocal compensation rates based on those costs that apply to both Qwest and CLECs.

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[43] Ex. 501T (Pac-West Sumpter Response) at 9.

[44] *Id.* ¶ 64.

The FCC in the *ISP Remand Order* carved out ISP bound traffic from reciprocal compensation and made ISP bound traffic subject to a rate well below that of the switching costs this Commission found were incurred in Washington, but the FCC nevertheless required – and continues to require – some level of compensation to the carrier that terminates the traffic. By requiring CLECs to terminate "VNXX" traffic without compensation, however, the Initial Order ignores those past Commission and FCC orders and the costs that CLECs incur. Such a requirement is fundamentally inconsistent with applicable state and federal law. The cost "assumptions" in the Initial Order, therefore, actually undermine its findings and conclusions on intercarrier compensation.

7. The Initial Order Misconstrues Other State Commission Decisions and Would Impose a Needlessly Complex Intercarrier Compensation Scheme.

38. The Initial Order purports to have looked at what other states have done with respect to intercarrier compensation for "VNXX" traffic, referring to Colorado, Iowa, Oregon, and Texas as examples of states that have adopted bill and keep.[45] The Initial Order acknowledges but rejects as "more complicated than necessary"[46] the California commission's approach of requiring the ILEC to pay per minute of use compensation while requiring CLECs to pay transport charges if the CLECs do not establish a point of interconnection ("POI") at the tandem switch serving the local calling area in which the traffic originates. The Initial Order misconstrues and misapplies these other state commission decisions.

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[45] *E.g.*, Initial Order ¶ 96.

[46] *Id.* ¶ 104, n.102.

39. The Initial Order is correct that the state commissions in Colorado, Iowa, Oregon, and Texas have adopted bill and keep for "VNXX" traffic, but they have not done so in isolation, as the Initial Order proposes. In Oregon, for example, the state commission has long prohibited both ILECs and CLECs from providing FX service and authorized carriers to provide "VNXX" service to ISPs on a bill and keep basis as an exception to that general prohibition.[47] Colorado and Iowa have adopted bill and keep for *all* ISP-bound traffic, not just "VNXX."[48] The Texas commission has required bill and keep for *all* FX traffic, not just "VNXX."[49] In all of these states, bill and keep for "VNXX" traffic is part of an integrated intercarrier compensation structure, not simply grafted onto the existing structure without regard to issues of discrimination and anticompetitive impact as the Initial Order would do in Washington.

40. The Initial Order's rejection of the California commission's compensation mechanism as "more complicated than necessary" is simply baffling. The Initial Order agrees with Staff on this point, but neither the Initial Order nor Staff explains their conclusion. The California solution, however, is fundamentally simple. FX traffic, including "VNXX," is treated the same as other "local" traffic for purposes of per minute of use intercarrier compensation. The ILEC may impose a transport charge on "VNXX" traffic if the ILEC must transport that traffic beyond the tandem switch that serves the local calling area where the call originates and to which the telephone numbers are

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[47] *E.g.*, TR. at 531, lines 9-15 (Staff Williamson).

[48] *E.g.*, *In re Petition of Qwest for Arbitration with AT&T Communications of the Mountain States, Inc. and TCG-Colorado,* Docket No. 03B-287T, Decision No. C03-1189 (Colorado PUC Oct. 14, 2003); *In re Arbitration of Sprint Communications Company and Qwest*, Docket No. ARB-00-1, Arbitration Order (Iowa Utils. Bd. Dec. 21, 2000).

[49] *Arbitration of Non-costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Texas PUC Docket No. 28821, Arbitration Award – Track II Issues at 9 (June 17, 2005).

rated.[50] If the CLEC establishes a POI at each tandem switch serving a local calling area in which the CLEC has number assignments, therefore, "VNXX" traffic is treated exactly the same as "local" and other types of FX traffic. Such a compensation scheme is a model of simplicity, as well as non-discriminatory and competitively neutral.[51]

41. The bill and keep scheme in the Initial Order, on the other hand, is mind-numbingly complex. The Initial Order includes no findings on how to determine when traffic is "VNXX." Qwest assumes that large traffic imbalances in local calling areas other than the local calling area in which the CLEC switch is physically located indicate the existence of "VNXX" traffic, but even Qwest concedes that this methodology is only a "red flag" designed to identify "probable" "VNXX" traffic and requires the parties to meet and confer to determine the actual existence and extent of any such traffic.[52] That still begs the question of how the parties are supposed to make that determination.

42. The Initial Order apparently assumes that carriers know where their customers are physically located. The record evidence does not support such an assumption. A CLEC customer may collocate equipment in a CLEC switch center and provide its own facilities to its undisclosed physical location. This is particularly true of CLEC customers who are themselves carriers and who, in turn, have their own end user customers.[53] Indeed, CLEC customers include a variety of customers. For example it would be virtually

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[50] *E.g., In re Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service, et al.*, Rulemaking 95-04-043, *et al.*, Decision 07-02-031, Opinion Regarding Treatment of Virtual NXX Calls With Respect to Small Local Exchange Carriers at 17-18 (Feb. 15, 2007).

[51] The California solution, moreover, does not require identification of either originating or terminating carrier's customers or their physical locations, thereby reducing disputes, and encourages all industry participants to have interconnection facilities at every local tandem, which encourages network investment.

[52] Tr. at 309-10 (Qwest Brotherson).

[53] *See, e.g.* Ex. 451T (Level 3 Greene Direct) at 15-17; Ex. 453 (Level 3 Ex. MGD-2).

impossible to determine the physical location of paging company customers when they receive a page to their "local" telephone number or to record and bill for calls that are forwarded to a physical location outside the local calling area. These examples only skim the surface of the potential complexity of identifying customers' physical location as wireline and wireless offerings continue to converge.

43. The Initial Order, however, would require CLECs to determine the physical location not only of their customers but of their customers' customers. More ominously, CLECs would be required to provide this information, to the extent it is even possible to generate it, to Qwest and/or the Commission in order to prove that traffic is not "VNXX" and thus is subject to compensation. Requiring the creation and disclosure of such records solely for the regulatory purpose of obtaining compensation is the antithesis of federal and state law and pro-competitive public policy.

44. This task is no less complex with respect to ISPs. Again, the Initial Order is silent on this issue but apparently assumes that the location of the ISP modem determines the physical location of the customer for purposes of intercarrier compensation. Not only might the CLEC not know where the modem is located, as discussed above, but modems represent outdated technology. Level 3's discussion of its network demonstrates that modems have been replaced by IP portals or "Media Gateways," which by their nature are centralized hubs for providing access to the Internet that by design are not sufficiently numerous to be located in each local calling area.[54] Indeed, Qwest's VoIP affiliate obtains circuits from Qwest from its "Network Access Server" to each local calling area

[54] Ex. 451T (Level 3 Greene Direct) at 17, lines 5-21.

but does not establish a Network Access Server in each local calling area.[55] Where is the Qwest affiliate physically located for purposes of intercarrier compensation for calls that CLEC customers make to that affiliate's customers? If there are no modems, where is an ISP physically located? If a CLEC obtains or builds facilities into the local calling area that are dedicated to its customers, like Qwest provides to its affiliate, do those customers have a physical presence in the local calling area sufficient to make the traffic "local"?

45. The Initial Order does not answer these questions, rendering its bill and keep scheme not only complex but a virtual invitation to future disputes over whether traffic is or is not "VNXX." If the Commission is looking for guidance from another state commission, the California commission's resolution of intercarrier compensation for "VNXX" traffic is the most simple, both in design and implementation. Once the CLEC establishes a presence in the local calling area by securing and paying for the dedicated transport facilities from its switch to the Qwest tandem serving that local calling area, "VNXX" traffic is treated the same as FX and other locally dialed traffic. In terms of the Act, "VNXX" traffic thus is considered Section 251(b)(5) (or ISP-bound, as applicable) traffic, not some new and distinct category of traffic for intercarrier compensation purposes. Indeed, the California commission's resolution has the additional benefit of having been found by the Ninth Circuit to be consistent with federal law.[56] The Commission should adopt that resolution before accepting the bill and keep scheme in the Initial Order if the Commission believes that Qwest should not be required to pay to transport traffic outside the local calling area.

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[55] See, e.g., Ex. 24T (Qwest Brotherson Rebuttal) at 39, lines 10-14; Ex. 454 (Level 3 Ex. MGD-3).

[56] *Verizon California, Inc. v. Peevey*, 462 F.2d 1143 (9th Cir. 2006).

C. The Commission Should Ensure that Any Findings on Intercarrier Compensation for "VNXX" Traffic Are Not Inconsistent With the Federal District Court's Order in the Pac-West and Level 3 Complaint Cases.

46. The Initial Order states that Qwest filed the complaint initiating this proceeding "as the result of Commission final orders in Dockets UT-053036 and UT-053039," Pac-West's and Level 3's petitions to enforce their interconnection agreements. The federal District Court reversed and remanded those orders with the following instructions to the Commission:

> On remand, the WUTC is simply directed to reinterpret the *ISP Remand Order* as applied to the parties' interconnection agreements, and classify the instant VNXX calls, for compensation purposes, as within *or* outside a local calling area, to be determined by the assigned telephone numbers, the physical routing points of the calls, or any other chosen method within the WUTC's discretion.[57]

47. The Commission has not yet taken action on remand, and full compliance with the District Court's decision should be addressed in the remand proceedings. The Initial Order, however, addresses intercarrier compensation for "VNXX" traffic, including the "VNXX" ISP-bound traffic that is at issue in the remand proceedings. The Initial Order does not characterize that traffic as either "within *or* outside a local calling area" for compensation purposes but imposes bill and keep and transport charges based on the "hybrid" nature of the traffic. The Initial Order thus does not satisfy the District Court's requirements.

48. To the extent that the Commission establishes the compensation mechanism for "VNXX" traffic in this proceeding, the Commission should do so either by (1) finding

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[57] *Qwest v. WUTC*, 484 F. Supp. 2d 1160, 1177 (W.D. Wash. 2007).

and concluding that "VNXX" traffic, like other FX and FX-like traffic, is within the local calling area for compensation purposes; or (2) expressly declining to determine whether such traffic is within or outside the local calling area for compensation purposes until issuing a final order on remand in the Pac-West and Level 3 proceedings.

REQUEST FOR RELIEF

49. WHEREFORE, Pac-West respectfully requests that the Commission review the Initial Order and grant the following relief:

(1) Dismiss Qwest's complaint; and

(2) With respect to intercarrier compensation for "VNXX" traffic, either

(a) Take no further action; or alternatively,

(b) make findings of fact and conclusions of law, consistent with the District Court's remand instructions, that "VNXX" service is within the local calling area for compensation purposes and is subject to the same intercarrier compensation as other FX or FX-like services and otherwise locally dialed traffic; and

(3) Such other or further relief as the Commission finds fair, just, reasonable, and sufficient.

DATED this 25th day of October, 2007.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Pac-West Telecomm, Inc.

By _____
Gregory J. Kopta
WSBA No. 20519

CERTIFICATE OF SERVICE
UT-063038

I certify that I have this day served the attached **Pac-West Petition for Administrative Review of Order 02 Initial Order** upon all parties of record in this proceeding by sending a copy by electronic mail and U.S. Mail, unless otherwise specified, to the following parties or attorneys of parties:

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I also certify that on this day the attached original and 7 copies of **Pac-West Petition for Administrative Review of Order 02 Initial Order** was served via e-mail and messenger delivery to the following:

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Dated this 25th day of October, 2007.

By: Mary Scarsorie
Mary Scarsorie