

[Service Date August 23, 2005]

BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC.,	)	DOCKET NO. UT-053036
	)	
Petitioner,	)	
	)	ORDER NO. 03
v.	)	
	)	
QWEST CORPORATION,	)	RECOMMENDED DECISION TO
	)	GRANT PETITION
Respondent.	)	
.....	)	

1 **SYNOPSIS:** *The recommended decision would grant Pac-West's petition and order Qwest to compensate Pac-West for transport and termination of all local and ISP-bound traffic originated by Qwest, including FX/VNXX traffic, according to the rates, terms, and conditions in the ISP Amendment including all amounts Pac-West has billed Qwest for traffic terminated since January 1, 2004, plus interest.*

2 **Proceedings.** Docket No. UT-053036 involves a petition filed by Pac-West Telecomm, Inc. (Pac-West), pursuant to WAC 480-07-650, for enforcement of its interconnection agreement with Qwest Corporation (Qwest). In particular, Pac-West asks the Commission to enforce the terms of the interconnection agreement relating to payment to Pac-West for terminating traffic. The dispute centers on whether Pac-West is entitled to compensation for "VNXX"<sup>1</sup> traffic. Qwest filed an answer and counterclaims to the petition.

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<sup>1</sup> "VNXX" or "Virtual NXX" refers to a carrier's acquisition of a telephone number for one local calling area that is used in another geographic area. The call appears local based on the telephone number.

- 3     **Parties.** Gregory J. Kopta, Davis Wright Tremaine, LLP, Seattle, Washington, represents the petitioner, Pac-West. Lisa Anderl, attorney, Seattle, Washington represents the respondent, Qwest.

## I.     MEMORANDUM

- 4     **Background and Procedural History.** Pac-West and Qwest are parties to the Local Interconnection Agreement between Qwest and Pac-West for Washington. (Interconnection Agreement). The Interconnection Agreement is the result of Pac-West's request, pursuant to 47 U.S.C. § 252 (i), to opt into the Local Interconnection Agreement between Qwest and Northwest Telephone, Inc., for Washington. The Commission approved the Interconnection Agreement on February 14, 2001, in Docket No. UT-013009.

- 5     Section (C)2.3.4.1.1, of the parties' Interconnection Agreement provides as follows:

The parties agree that per minute of use call termination rates as described in Part H of this Agreement will apply reciprocally for the termination of Exchange Service (EAS/Local) traffic.

- 6     Section (C)2.3.4.1.3, of the parties' Interconnection Agreement provides as follows:

As set forth above, the parties agree that reciprocal compensation only applies to Local Traffic and further agree that the FCC has determined that traffic originated by either party (the "Originating Party") and delivered to the other party, which in turn delivers the traffic to an enhanced service provider (the "Delivering Party") is primarily interstate in nature. Consequently, the Delivering Party must identify which, if any, of this traffic is Local

Traffic. The Originating Party will only pay reciprocal compensation for the traffic the Delivering Party has substantiated to be Local Traffic. In the absence of such substantiation, such traffic shall be presumed to be interstate.

- 7 On May 24, 2002, Pac-West and Qwest executed an Internet Service Provider (ISP) Bound Traffic Amendment (ISP Amendment") to the Interconnection Agreement to incorporate the FCC's Order on Remand and Report and Order in CC Docket 99-68 (*ISP Remand Order*)<sup>2</sup>. The Commission approved the ISP Amendment on March 12, 2003, in Docket No. UT-013009.
- 8 The ISP Amendment modifies section (C) 2.3.4.1.3, of the Interconnection Agreement, providing in Section 1.4 that "'ISP-Bound' is as described by the FCC'" in the FCC ISP Order and in section 3.2.1 that "Qwest will presume traffic delivered to [Pac-West] that exceeds a 3:1 ratio of terminating (Qwest to [Pac-West]) to originating ([Pac-West] to Qwest) traffic is ISP-bound traffic."<sup>3</sup>
- 9 In early 2004, Qwest began to withhold payment on Pac-West's invoices for compensation alleging that Pac-West had exceeded the growth ceilings for ISP traffic described in section 3.2.2 of the ISP Amendment. After following the dispute resolution provisions of the Interconnection Agreement, Pac-West and Qwest agreed to a private arbitration to resolve this issue.<sup>4</sup> During the pendency of the arbitration, the FCC released its Order in *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, FCC 04-241 (Oct. 8, 2004) (Core Order). In the Core Order the FCC found that the growth ceilings were no longer in the public

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<sup>2</sup> *Order on Remand in the Matter of Implementation of the Local Competition provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-bound Traffic*, CC Docket No. 96-98 (April 17, 2001).

<sup>3</sup> Relevant portions of the Interconnection Agreement and the ISP Amendment are appended to this Order as Appendix A and B.

<sup>4</sup> AAA Case #77Y181-00385-02 (JAG Case No. 221368).

interest and forebore applying them. The FCC, on its own motion, extended the grant of forbearance with respect to those rules to all telecommunications carriers.<sup>5</sup> On December 2, 2004, the Arbitrator concluded that the growth ceilings expired at the end of 2003, and that Pac-West is entitled to compensation beginning January 1, 2004, without application of the cap.<sup>6</sup> Qwest did not appeal the Arbitrator's decision.<sup>7</sup>

10 On December 29, 2004, Qwest notified Pac-West that Qwest intended to withhold compensation for alleged "VNXX" traffic retroactive to the beginning of 2004. Pac-West alleges that Qwest has withheld \$637,389.80 in compensation for traffic Pac-West has terminated from January 1, 2004 through March 31, 2005.<sup>8</sup> Pac-West agreed to attempt to negotiate this dispute with Qwest, but the negotiations were unsuccessful. On April 25, 2005, Qwest notified Pac-West that it had decided to withhold 68.3% of Pac-West's "billed ISP minutes" in Washington in the second quarter of this year.<sup>9</sup> On May 12, 2005, Pac-West served a Notice of Intent to File Petition for Enforcement of the Agreement. Pac-West filed its Petition on June 9, 2005, and on June 15, 2005, Qwest filed an Answer to Petition for Enforcement of Interconnection Agreement, and Counterclaims.

11 The Commission convened a prehearing conference on June 27, 2005, before Administrative Law Judge C. Robert Wallis.<sup>10</sup> Under WAC 480-07-650, which establishes an expedited process whereby a telecommunications company may seek enforcement of its interconnection agreement with another carrier, parties and the presiding officer may determine the best procedure for conducting the

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<sup>5</sup> Core Order at ¶ 27.

<sup>6</sup> Arbitrator's Ruling on Joint Motions for Summary Judgment, AAA Case #77Y181-00385-02 (JAG Case No. 221368), Exhibit C of Pac-West Petition.

<sup>7</sup> Ethan Sprague Affidavit ¶¶ 6-10, attached to Pac-West Petition.

<sup>8</sup>Id., ¶¶ 11 & 16.

<sup>9</sup> Id., ¶¶ 12-15.

<sup>10</sup> Due to schedule conflicts, the matter was reassigned to Administrative Law Judge Karen M. Caillé.

enforcement proceeding. In this proceeding, the parties agreed to proceed on written filings and an oral presentation.<sup>11</sup> The parties filed simultaneous briefs on July 27, 2005, and presented oral arguments before Administrative Law Judge Karen M. Caillé on August 3, 2005.

- 12 **Pac-West Petition.** In its petition, Pac-West alleges that Qwest is in breach of the Interconnection Agreement, as well as the underlying federal law, in refusing to compensate Pac-West for all local and ISP bound traffic, including calls from Qwest customers to an ISP that obtains FX/VNXX service from Pac-West. <sup>12</sup>
- 13 Pac-West alleges that the Interconnection Agreement requires the parties to compensate each other for terminating “Exchange Service (EAS/Local) traffic.” Pac-West asserts that FX/VNXX service is “Exchange Service” provided to a customer physically located in a different exchange. According to Pac-West, the industry has recognized this fact by rating and routing calls within the customer’s local calling area as local calls, regardless of the physical location of the customer. Pac-West notes that “[s]pecifically with respect to ISP-bound traffic, the FCC has concluded that ‘traffic delivered to an ISP is predominantly interstate access traffic subject to section 201 of the Act, and [the FCC has] establish[ed] an appropriate cost recovery mechanism for the exchange of such traffic.’<sup>13</sup> Pac-West contends that the compensation requirements of the ISP Remand Order are incorporated in the Interconnection Agreement through the ISP Amendment. According to Pac-West, nothing in the ISP Remand Order or the Interconnection Agreement limits compensable traffic to ISPs that are physically located in the same local calling area as the calling party.<sup>14</sup>

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<sup>11</sup> The written filings consist of the Petition with attached exhibits and affidavit, the Answer with attached exhibits, and the parties’ briefs with attached exhibits.

<sup>12</sup> Pac-West Petition at ¶ 12.

<sup>13</sup> ISP Remand Order, ¶ 1.

<sup>14</sup> Pac-West Petition at ¶ 12.

14 Pac-West also alleges that Pac-West and Qwest have been exchanging traffic including FX/VNXX traffic, pursuant to the Interconnection Agreement since February 2001, therefore Qwest cannot now re-interpret the Interconnection Agreement to preclude Pac-West from receiving compensation for terminating the very traffic for which Qwest has consistently compensated Pac-West for years.<sup>15</sup>

15 Finally, Pac-West alleges that Qwest is impermissibly attempting to evade an arbitrator's decision that interpreted the Interconnection Agreement to require Qwest to compensate Pac-West for all ISP-bound traffic it terminates beginning January 1, 2004.<sup>16</sup>

16 Pac-West asks the Commission to enter an order requiring that Qwest comply with the Interconnection Agreement, specifically that Qwest compensate Pac-West for transport and termination of all local and ISP-bound traffic originated by Qwest, including FX/VNXX traffic, according to the rates, terms, and conditions in the ISP Amendment, including all amounts Pac-West has billed Qwest for traffic terminated since January 1, 2004, plus interest for all overdue payments at the interest rate specified in the Interconnection Agreement.<sup>17</sup>

17 **Qwest Answer.** Qwest answers that Pac-West's position that all calls to an ISP Server are to be treated according to the scheme in the *ISP Remand Order*, no matter where the ISP Server is physically located is contrary to FCC precedent which requires that a computer (such as an ISP Server) be treated exactly the same as other end-user customers in determining whether a call to the computer is treated as a toll call or a local call. In other words, a call originated from one local calling area to an ISP Server physically located in another local calling area is treated as a toll call. Qwest explains that this is the basis for the so-called "ESP

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<sup>15</sup> *Id.* at ¶ 13.

<sup>16</sup> *Id.* at ¶ 14.

<sup>17</sup> *Id.* at p. 6.

Exemption," which prevents a local exchange carrier from charging switched access charges for a call made to a local computer on the basis that the computer ultimately directs the call to an end point or to another station located in another state.<sup>18</sup>

18 Additionally, Qwest contends that Pac-West's position ignores applicable Washington administrative rules and definitions and this Commission's recently ruling in the *AT&T/Qwest Arbitration* proceeding,<sup>19</sup> dealing with the definition of a "local" call, in which the Commission accepted Qwest's definition of "Exchange Service" or "Extended Area Service (EAS)/Local Traffic" to mean traffic that originates and terminates within the same Commission-determined local calling area.<sup>20</sup>

19 Qwest also contends that Pac-West's position is contrary to the plain language of the parties' Interconnection Agreement. According to Qwest, the traffic that Pac-West expects Qwest to exchange does not match any of the specifically-defined traffic types the parties have agreed to exchange under the terms of the Interconnection Agreement and the Single Point of Presence (SPOP) amendment to the Interconnection Agreement.<sup>21</sup>

20 Qwest denies Pac-West's allegations about the compensation for traffic that Pac-West has terminated. Qwest further denies the Pac-West claim that there is approximately \$637,389.80 in dispute from January 1, 2004 through March 31, 2005. Rather, Qwest submits that the maximum amount of the claim is

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<sup>18</sup> Qwest Answer, ¶¶ 8-11.

<sup>19</sup> *In the Matter of the Petition for Arbitration of AT&T Communications of the Pacific Northwest and TCG Seattle with Qwest Corporation*, Docket No. UT-033035, Order Nos. 04 and 05, (December 2003, February 2004) (*AT&T/Qwest Arbitration*)

<sup>20</sup> Qwest Answer at ¶ 12.

<sup>21</sup> *Id.* at ¶ 13.

approximately \$401,736.00, based on usage from January 1, 2004 through March 31, 2005.<sup>22</sup>

- 21 Qwest counterclaims that Pac-West's assignment of local telephone numbers and NPA/NXXs in local calling areas other than the local calling area where its customer's ISP Server is physically located, constitutes misuse of telephone numbering resources, and Pac-West's attempt to bill Qwest the *ISP Remand Order* rate for such VNX traffic, are violations of federal law.<sup>23</sup>
- 22 Qwest further counterclaims that Pac-West's assignment of local telephone numbers and NPA/NXXs in local calling areas other than the local calling area where its customer's ISP Server is physically located, constitutes misuse of telephone numbering resources, and Pac-West's attempt to bill Qwest the *ISP Remand Order* rate for such VNX traffic, are violations of Washington law.<sup>24</sup>
- 23 Qwest also claims that Pac West's assignment of local telephone numbers to ISP Servers which are physically located outside the local area to which the telephone number is assigned violates Section (G) 3.7 of the Interconnection Agreement, which provides that "[e]ach party is responsible for administering NXX codes assigned to it."<sup>25</sup>
- 24 Lastly, Qwest claims that Pac-West is violating its Interconnection Agreement by attempting to obligate Qwest to send non-local ISP traffic over Local Interconnection Service (LIS) Trunks, contrary to Section 1.1 of the Single Point of Presence (SPOP) amendment.<sup>26</sup>

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<sup>22</sup> *Id.* at ¶49

<sup>23</sup> Qwest Answer at ¶ 58.

<sup>24</sup> *Id.* at ¶¶ 59-60.

<sup>25</sup> *Id.* at ¶¶ 61-62.

<sup>26</sup> *Id.* at ¶¶ 63-66.

25 Qwest requests that the Commission (1) enter an order (a) prohibiting Pac-West from assigning NPA/NXXs in local calling areas other than the local calling area where the ISP Server is physically located, (b) requiring that Pac-West cease its misuse of telephone numbering resources, and (c) requiring that Pac-West properly assign telephone numbers based on the actual physical location of its customer's ISP Server; (2) enter an order that the parties' Interconnection Agreement does not require any compensation for Pac-West's VNXX traffic; (3) direct Pac-West to follow the change of law procedures contained in its interconnection agreement with Qwest to implement the *Core Forbearance Order*; (4) invalidate all Pac-West bills to Qwest seeking or charging reciprocal compensation or the *ISP Remand Order* rate of \$0.0007 per minute for any of the VNXX traffic described above; and (5) enter an order prohibiting Qwest from routing VNXX traffic to Pac-West utilizing LIS facilities.<sup>27</sup>

## II. DISCUSSION AND DECISION

26 Pac-West and Qwest are in agreement that the primary issue before the Commission is whether the parties' Interconnection Agreement requires Qwest to compensate Pac-West for delivering calls from Qwest customers to Pac-West ISP customers when the telephone numbers of both customers are assigned to the same local calling area, including those calls from Qwest customers to an ISP that obtains foreign exchange service from Pac-West via VNXX. The parties have presented a variety of arguments in support of their respective positions in their pleadings and briefs. The discussion in this Order will focus on those arguments key to a decision on the primary issue.

27 Since the parties' Interconnection Agreement incorporates the *ISP Remand Order* through the ISP Amendment, a key argument that must be resolved to reach a decision on the primary issue is whether the *ISP Remand Order* requires

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<sup>27</sup> *Id.* at ¶ 67.

interconnecting carriers to compensate each other for terminating *all* ISP-bound traffic. In support of its position that the *ISP Remand Order* requires compensation for terminating *all* ISP-bound traffic, Pac-West quotes the first sentence in the first paragraph of the FCC's *ISP Remand Order*:

In this Order, we reconsider the proper treatment for purposes of intercarrier compensation of telecommunications traffic delivered to Internet service providers (ISPs).

- 28 In further support of its position, Pac-West references an arbitration before this Commission between Level 3 Communications and CenturyTel of Washington<sup>28</sup> wherein the Arbitrator explained, after quoting the same first sentence of the *ISP Remand Order*:

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

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<sup>28</sup> *In re Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc.*, Docket No. UT-023043, Fifth Supplemental Order, Arbitrator's Report and Decision ¶ 35 (Jan. 2, 2003) (*Level 3 Arbitration*)

29 Pac-West also notes that the Commission concluded in the *Level 3 Arbitration* that

ISP-bound calls enabled by virtual NXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements consistent with the FCC's ISP Order on Remand.<sup>29</sup>

30 Qwest argues that the *ISP Remand Order* addressed only traffic to an ISP server or modem located in the same local calling area as the end-user.<sup>30</sup> Qwest asserts that in defining ISP-Bound traffic in the ISP Remand Order, the FCC stated that "an ISP's end-user customers typically access the Internet through an ISP Server located in the same calling area, and that the end users pay the local exchange carrier for connections to the local ISP."<sup>31</sup> Qwest argues that further support for its position that the FCC was dealing only with "local" traffic in the *ISP Remand Order* is found at paragraphs 12 and 39.<sup>32</sup>

31 Pac-West observes that the Commission rejected this same argument in the *Level 3 Arbitration*, and a federal District Court judge in Connecticut recently reviewed the same statements on which Qwest relies and reached essentially the same conclusion as the Commission:

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

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<sup>29</sup> *Level 3 Arbitration, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision* ¶ 35 (Feb. 28, 2003).

<sup>30</sup> Qwest Br., ¶ 5.

<sup>31</sup> Qwest Br., ¶ 36, *ISP Remand Order*, ¶10 (Qwest's emphasis).

<sup>32</sup> Qwest Br., ¶¶ 37 & 39.

proceeded to set the compensation rates for all ISP-bound traffic. In short, though the FCC started with the question whether “local” ISP-bound traffic was subject to reciprocal compensation, it answered that question in the negative on the basis of its conclusion that all ISP-bound traffic was in a class by itself.<sup>33</sup>

- 32 In further support of its position, Qwest cites an *AT&T/Qwest Arbitration* proceeding in Washington<sup>34</sup> dealing with the definition of a “local” call. Qwest observes that the Commission ruled that the definition of local exchange service would remain traffic that originates and terminates within the same Commission-determined local calling area. Qwest further observes that the Commission rejected AT&T’s request for a definition based on “the calling and called NPA/NXXs, (*i.e.* VNXX), noting the Arbitrator’s concern that AT&T’s definition “is too sweeping in its potential effect and has potentially unacceptable consequences in terms of intercarrier compensation.”<sup>35</sup> Qwest states that Pac-West’s interconnection agreement has a similar definition of “Exchange Service” as that which is in the AT&T agreement. Specifically, the definition in the AT&T agreement is as follows:

‘Exchange Service’ or ‘Extended Area Service (EAS)/Local Traffic’ means traffic that is originated and terminated within the same Local Calling Area as determined for Qwest by the Commission.

- 33 The definition in Pac-West’s agreement (§(A)2.19) is as follows:

‘Extended Area Service (EAS)/Local Traffic’ (Exchange Service) means traffic that is originated by an end

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<sup>33</sup> Pac-West Br., ¶ 14, *Southern New England Tel. Co. v. MCI WorldCom Communications, Inc.*, 359 F. Supp. 2d 229, 231-32 (D. Conn. 2005)

<sup>34</sup> *In the Matter of the Petition for Arbitration of AT&T Communications of the Pacific Northwest and TCG Seattle with Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*, Docket No. UT-033035, Order No. 05 (Feb. 6, 2004) (*AT&T/Qwest Arbitration*)

<sup>35</sup> *Id.*

user of one party and terminates to an end user of the other party as defined in accordance with USW's [Qwest's] then current EAS/local serving areas, as determined by the Commission.

34 Pac-West contends that calls between Qwest customers and Pac-West customers with telephone numbers assigned to the same local calling area fit squarely within this definition of Extended Area Service (EAS)/Local Traffic, regardless of whether a customer's telephone or modem is physically located within that local calling area.<sup>36</sup> Pac-West argues that the plain language of the definition does not support Qwest's claim that the Interconnection Agreement excludes traffic bound to ISPs whose servers are not physically located in the same local calling area as the calling party. Pac-West points out that there is no reference in the definition to the physical location of either the calling or called party. Rather, the traffic simply must be between calling parties in accordance with established local calling areas. Pac-West contends that Qwest includes calls to its FX customers, including ISPs, within this traffic, and notes that the Commission has previously determined in the *AT&T/Qwest Arbitration* that Qwest's proposal to exclude these same calls to a competitor's FX customers "is anticompetitive and should not be allowed."<sup>37</sup>

35 Pac-West argues that the ISP Amendment to the Interconnection Agreement expressly states that compensation applies to ISP-bound traffic. Section 1.4 provides that "'ISP-Bound' is as described by the FCC" in the *ISP Remand Order*. Further, Section 3.2.1 states that "Qwest will presume traffic delivered to [Pac-West] that exceeds a 3:1 ratio of terminating (Qwest to [Pac-West]) to originating ([Pac-West] to Qwest) traffic is ISP-bound traffic."<sup>38</sup> Pac-West asserts that the FCC has never limited ISP-bound traffic to calls between a calling party and an

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<sup>36</sup> *Id.*, ¶ 23.

<sup>37</sup> *Id.*, ¶ 25, *AT&T/Qwest Arbitration*, Order No. 4, Arbitrator's Report, ¶ 33. The Commission also found herein that VNX service is "functionally identical to Qwest's FX service from a customer perspective." *Id.*, ¶ 36, n. 20.

ISP server or modem that are physically located in the same local calling area. Therefore, Pac-West is entitled to compensation at the rates specified in the ICA for ISP-bound traffic between Qwest customers and Pac-West ISP customers whose telephone numbers are assigned to the same local calling area.<sup>39</sup>

- 36      **Decision.** The Commission has the authority to enforce interconnection agreements under Sections 251 and 252 under the Telecommunication Act of 1996. Pac-West and Qwest are parties to an Interconnection Agreement approved by the Commission. Based on Pac-West's interpretation of the *ISP Remand Order*, Pac-West alleges that Qwest is in breach of the Interconnection Agreement in refusing to compensate Pac-West for all local and ISP-bound traffic, including calls from Qwest customers to an ISP that obtains FX/VNXX service from Pac-West. Based on Qwest's interpretation of the *ISP Remand Order*, Qwest contends that Pac-West is not entitled to compensation because no intercarrier compensation is due for VNXX non-local ISP traffic. The Interconnection Agreement is modified by the ISP Amendment that provides that "'ISP-Bound' is as described by the FCC" in the *ISP Remand Order*. Resolution of the parties' dispute turns on the scope of "ISP-Bound" traffic as described by the FCC in the *ISP Remand Order*.
- 37      This Order adopts Pac-West's interpretation of the scope of "ISP-Bound" traffic described by the FCC in the *ISP Remand Order*. Specifically, ISP-bound calls enabled by VNXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements. This interpretation is consistent with the Commission's decision in the *Level 3 Arbitration*, as well as a recent of the U.S. District Court for the District of Connecticut.<sup>40</sup>

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<sup>38</sup> *Id.*, ¶ 24.

<sup>39</sup> *Id.*

<sup>40</sup> *The Southern New England Telephone Company V. MCI WorldCom Communications, Inc.*, 359 F. Supp. 2d 229 (March 16, 2005).

- 38 Accordingly, the Commission should order Qwest to compensate Pac-West for transport and termination of all local and ISP-bound traffic originated by Qwest, including FX/VNXX traffic, according to the rates, terms, and conditions in the ISP Amendment, including all amounts Pac-West has billed Qwest for traffic terminated since January 1, 2004. While the parties are not in agreement on the amount that Qwest owes Pac-West, this order would recommend that the Commission use Pac-West's total of \$637,389.80, which is based on spreadsheets provided by Qwest.<sup>41</sup>
- 39 In addition, given that the FCC in the *Core Order* held that its rationale for forbearance with respect to the growth caps and new markets rules applies with equal force to other telecommunications carriers, and thus on its own motion, extended the grant of forbearance with respect to those rules to all telecommunications carriers, and the private Arbitrator's conclusion that the *Core Order* should not be read as an intent by the FCC to change the law established by the *ISP Remand Order*, but rather to make clear the intent of that order as originally issued (that the growth cap on minutes for ISP-bound traffic compensation expired at the end of 2003)<sup>42</sup>, this Order would deny Qwest's counterclaim requesting the Commission to direct Pac-West to follow the change of law procedures contained in its interconnection agreement with Qwest to implement the *Core Order*.
- 40 Lastly, this Order does not address the remainder of Qwest's counterclaims either because they are resolved by the recommended outcome in this proceeding or they allege violations of law other than the Interconnection Agreement, or there are no laws to be violated with respect to the particular counterclaim.

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<sup>41</sup> See, CONFIDENTIAL spreadsheet attached to Pac-West Brief as Exhibit B.

<sup>42</sup> *Arbitrator's Ruling on Joint Motions for Summary Judgment*, AAA Case #77Y181-00385-02 (JAG Case No. 221368), Exhibit C of Pac-West Petition.

### III. FINDINGS OF FACT

- 41 Having discussed in detail the documentary evidence received in this proceeding concerning all material matters and having stated findings and conclusions upon issues at impasse among the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by this reference.
- 42 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate in the public interest the rates, services, facilities and practices of telecommunications companies in the state.
- 43 (2) The Washington Utilities and Transportation Commission is designated in the Telecommunication Act of 1996 as the agency responsible for arbitrating and approving interconnection agreements between telecommunications carriers, pursuant to sections 251 and 252 of the Act.
- 44 (3) Qwest is an incumbent local exchange carrier, as defined in the Act, furnishing basic local exchange services in the state of Washington.
- 45 (4) Pac-West is a competitive local exchange carrier, as defined in the Act, providing basic local exchange service in the state of Washington.
- 46 (5) Pac-West and Qwest have negotiated an Interconnection Agreement that has been approved by the Commission on February 14, 2001, in Docket No. UT-013009.

- 47 (6) Pac-West and Qwest have executed an ISP Amendment to the Interconnection Agreement, to incorporate the *ISP Remand Order*, that the Commission approved on March 12, 2003, in Docket No. UT-013009.
- 48 (7) In early 2004, Qwest began to withhold payment on Pac-West's invoices for compensation alleging that Pac-West had exceeded the growth ceilings for ISP traffic described in section 3.2.2 of the ISP Amendment. This matter was ultimately decided by a private arbitrator who ruled in Pac-West's favor based on the FCC's *Core Order*.
- 49 (8) In December 2004, Qwest notified Pac-West that Qwest intended to withhold compensation for alleged "VNXX" traffic retroactive to the beginning of 2004.
- 50 (9) In April 2005, Qwest notified Pac-West that Qwest had decided to withhold 68.3% of Pac-West's "billed ISP minutes" in Washington in the second quarter of 2005.
- 51 (10) Pac-West filed its Petition for Enforcement of Interconnection Agreement on June 9, 2005, alleging that Qwest refused to compensate Pac-West for all local and ISP-bound traffic, including calls from Qwest customers to an ISP that obtains foreign exchange service from Pac-West.
- 52 (11) The amount owed to Pac-West is \$637,389.80, based on spreadsheets provided by Qwest.

#### IV. CONCLUSIONS OF LAW

- 53 (1) The Commission has jurisdiction over the subject matter and parties to this proceeding.
- 54 (2) The Washington Utilities and Transportation Commission is designated in the Telecommunication Act of 1996 as the agency responsible for arbitrating and approving interconnection agreements between telecommunications carriers, pursuant to sections 251 and 252 of the Act.
- 55 (3) Pursuant to the parties' Interconnection Agreement as modified by the ISP Amendment, which incorporates the *ISP Remand Order*, and specifically the FCC's description of "ISP-Bound" traffic, Pac-West is entitled to compensation from Qwest for transport and termination of all local and ISP bound traffic originated by Qwest, including FX/VNXX traffic, according to the rates, terms and conditions in the ISP Amendment.
- 56 (4) Pursuant to the *Core Order* and the Private Arbitrator's decision Pac-West is entitled to compensation described in Conclusion (3) from January 1, 2004.
- 57 (5) Pursuant to the *Core Order* and the Private Arbitrator's decision Qwest's counterclaim requesting the Commission to direct Pac-West to follow the change of law procedures contained in its Interconnection Agreement with Qwest to implement the *Core Order* should be denied.

V. RECOMMENDED DECISION

58 IT IS RECOMMENDED That the Commission grant Pac-West's petition and order Qwest to compensate Pac-West for transport and termination of all local and ISP-bound traffic originated by Qwest, including FX/VNSS traffic, according to the rates, terms and conditions in the ISP Amendment, including all amounts Pac-West has billed Qwest for traffic terminated since January 1, 2004, plus interest for all overdue payments at the interest rate specified in the Interconnection Agreement.

DATED at Olympia, Washington, and effective this 23rd day of August, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

KAREN M. CAILLE  
Administrative Law Judge

**Post Recommended Decision Process:** Qwest may file Exceptions to the Recommended Decision by September 9, 2005. Pac-West may file its Answer to the Exceptions to the Recommended Decision by September 23, 2005. The Commission may schedule the matter for oral argument at a special open meeting, and will notify the parties of its decision.