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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Qwest Corporation,  
Plaintiff,

vs.

Arizona Corporation Commission; Jeff  
Hatch-Miller, Chairman, William A.  
Mundell, Commissioner, Mike Gleason,  
Commissioner, Kristin K. Mayes,  
Commissioner, and Barry Wong,  
Commissioner, in their official capacities  
as Commissioners of the Arizona  
Corporation Commission; and  
Level 3 Communications, LLC; and  
Pac-West Telecomm, Inc.,  
Defendants.

No. CV-06-2130-PHX-SRB

**ORDER**

Pending before the Court is Plaintiff, Qwest's challenge to the final orders of the Arizona Corporation Commission ("ACC") issued in two separate proceedings held to construe Qwest's obligations to Defendants Level 3 and Pac-West under amendments to their Interconnection Agreements.

**I. BACKGROUND**

**A. Telecommunications Regulation**

**1. The Telecommunications Act of 1996**

1 Prior to the enactment of the Telecommunications Act of 1996 (“TCA”), 47 U.S.C.  
2 151 *et seq.*, local telephone service in this country “was provided primarily by a single  
3 company within each local area that had an exclusive franchise to serve an authorized  
4 territory within the state.” *Verizon Cal., Inc. v. Peevey*, 462 F.3d 1142, 1147 (9th Cir. 2006).  
5 Congress’s intent in enacting the TCA was “to end the local telephone monopolies and  
6 create a national telecommunications policy that strongly favored competition in the local  
7 telephone markets.” *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 61-62  
8 (1st Cir. 2006) (“*Global NAPs I*”) (quoting *Global NAPs, Inc. v. Verizon New England, Inc.*,  
9 396 F.3d 16, 18 (1st Cir. 2005)). In the wake of the TCA, a variety of telephone companies  
10 entered the local markets to take advantage of the new opportunities presented by  
11 deregulation. Level 3 and Pac-West are among these new market entrants, known as  
12 competitive local exchange carriers (“CLECs”), while Qwest, a carrier predating the TCA,  
13 is classified as an incumbent local exchange carrier (“ILEC”). *See Peevey*, 462 F.3d at 1146.

14 At the heart of the TCA is 47 U.S.C. § 251 which allows CLECs to interconnect with  
15 an ILEC’s physical network. Section 251(a)(1) provides generally that “[e]ach  
16 telecommunications carrier has the duty - (1) to interconnect directly or indirectly with the  
17 facilities and equipment of other telecommunications carriers.” Under interconnection, the  
18 company serving the caller—known as the originating carrier—and the company serving the  
19 recipient—known as the terminating carrier—have “[t]he duty to establish reciprocal  
20 compensation arrangements for the transport and termination of telecommunications.” 47  
21 U.S.C. § 251(b)(5). A reciprocal compensation arrangement is one where the LEC  
22 originating the call pays the LEC that terminates the call. *Peevey*, 462 F.3d at 1146. Thus,  
23 if a Qwest customer initiates a call to a Level 3 customer within the same local calling area,  
24 then Qwest must pay reciprocal compensation to Level 3.

25 ILECs’ and CLECs’ duties when negotiating the terms of an interconnection  
26 agreement are set forth in § 252. Carriers are obligated to negotiate in good faith, however,  
27 if they are unable to reach an agreement, then either “party to the negotiation may petition  
28 a State commission to arbitrate any open issues.” 47 U.S.C. § 252(b)(1). The state

1 commission then must “resolve each issue set forth in the petition and response,” and any  
2 resolution reached by the state commission must adhere to both the requirements of § 251  
3 and any regulation promulgated pursuant to § 251. 47 U.S.C. § 252(b)(4)(C), (c)(1). If the  
4 parties are able to reach an agreement without resort to arbitration, then the agreement may  
5 be made “without regard to the standards set forth in subsections (b) and (c) of section 251.”  
6 47 U.S.C. § 252(a)(1).

7         Despite the TCA’s overhaul of the regulatory landscape, the FCC has definitively  
8 stated that “the [TCA] preserves the legal distinctions between charges for transport and  
9 termination of local traffic and interstate and intrastate charges for terminating long-distance  
10 traffic.” *Peevey*, 462 F.3d at 1146 (quoting *In re Implementation of the Local Competition*  
11 *Provisions in the Telecomms. Act of 1996*, 11 F.C.C.R. 15499, 16013, ¶ 1034, 1996 WL  
12 452885 (Aug. 8, 1996) (“*Local Competition Order*”). The first category, generally referred  
13 to as local calls, includes “traffic [that] stays within the boundaries of a local calling area.”  
14 *Global NAPs I*, 444 F.3d at 62. The latter, which encompasses both interstate long distance  
15 and intrastate calls that cross the boundaries of a local calling area (commonly called  
16 exchange service or toll calls), is termed interexchange traffic. *Id.* at 62-63. The reciprocal  
17 compensation requirement created by § 251(b)(5) “applies only ‘to traffic that originates and  
18 terminates within a local area.’” *Peevey*, 462 F.3d at 1146 (quoting *Local Competition*  
19 *Order*, 11 F.C.C.R. at 16013, ¶ 1033). Interexchange traffic, on the other hand, is subject to  
20 an intercarrier compensation scheme know as access charges. With access charges, the long  
21 distance companies receive payment from the caller and they then pay compensation to the  
22 originating LEC as well as the terminating LEC. Thus, if a caller with local service provided  
23 by Level 3, and long distance provided by AT&T, were to initiate a long distance call to an  
24 out of state friend with local phone service supplied by Qwest, then AT&T would collect a  
25 usage-based fee from the caller and would distribute a portion of that money to both Level  
26 3 and Qwest.

1                   **2. Internet Service Provider (“ISP”)-Bound Traffic**

2                   Generally, the reciprocal compensation system is an effective means for adequately  
3 compensating LECs for voice-based telecommunications. However, in the context of traffic  
4 delivered to ISPs, the system created by the TCA has presented entrepreneurial CLECs with  
5 an opportunity to engage in a sort of regulatory arbitrage—where the CLEC profits not by  
6 charging their customer, but instead by positioning itself to receive a disproportionate amount  
7 of reciprocal compensation. *In re Implementation of the Local Competition Provisions in the*  
8 *Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16  
9 F.C.C.R. 9151, 9153, ¶ 2, 2001 WL 455869 (Apr. 27, 2001) (“*ISP Remand Order*”). This  
10 situation arises because CLECs, not ILECs, typically serve ISP clients, and ISPs are in the  
11 unique position of receiving almost exclusively one-way traffic. *In re Core Commc’ns*, 455  
12 F.3d 267, 270 (D.C. Cir. 2006). Unlike a normal voice customer, who would likely both  
13 place and receive local telephone calls, the ISPs typically only receive traffic; a customer  
14 (who generally obtains service from an ILEC) initiates the telephone call to the ISP (served  
15 by the CLEC), and that ISP then provides access to the world wide web through the local  
16 telephone connection. This is problematic because, under the reciprocal compensation  
17 system, the calling party’s carrier pays the terminating carrier, thus providing economic  
18 incentives for companies to serve ISPs at rates well below market cost while deriving their  
19 revenues not from the ISPs, but from the ILECs instead.

20                   Recognizing that “the existing intercarrier compensation mechanism for the delivery  
21 of [ISP] traffic . . . has created opportunities for regulatory arbitrage and distorted the  
22 economic incentives related to competitive entry into the local exchange and exchange access  
23 markets,” the FCC has repeatedly attempted to deal with the issue. *ISP Remand Order*, 16  
24 F.C.C.R. at 9153, ¶2. In 1999 the FCC issued the *Declaratory Ruling, In re Implementation*  
25 *of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier*  
26 *Compensation for ISP-Bound Traffic*, 14 F.C.C.R. 3689, 1999 WL 98037 (Feb. 26, 1999)  
27 (“*Declaratory Ruling*”), where it concluded that ISP-bound calls are “interstate traffic subject  
28 to the jurisdiction of the Commission under section 201 of the [TCA] and [are] not, therefore,

1 subject to the reciprocal compensation provisions of section 251(b)(5).” *ISP Remand Order*,  
2 16 F.C.C.R. at 9152, ¶ 1. On appeal, the Court of Appeals for the District of Columbia  
3 Circuit vacated the *Declaratory Ruling*, and held “that the Commission had inadequately  
4 explained its conclusion that ISP-bound traffic is non-local.” *In re Core Commc’ns*, 455  
5 F.3d at 271. On remand, the FCC produced the *ISP Remand Order* wherein it again  
6 concluded that ISP-bound calls within a local calling area are not subject to reciprocal  
7 compensation, and did so in reliance on an alternative statutory provision, 47 U.S.C. §  
8 251(g). *Id.* Section 251(g) exempts certain forms of telecommunications from the reciprocal  
9 compensation requirement of § 251(b)(5), including “exchange access, information access,  
10 and exchange services for such access to interexchange carriers and information service  
11 providers.” 47 U.S.C. § 251(g). The FCC “found that calls made to ISPs located within the  
12 caller’s local calling area fall within those enumerated categories-specifically, that they  
13 involve ‘information access.’” *In re Core Commc’ns*, 455 F.3d at 271 (quoting *ISP Remand*  
14 *Order*, 16 F.C.C.R. at 9171, ¶ 42).

15 After concluding that local ISP-bound calls are not subject to reciprocal compensation  
16 under § 251(b)(5), the *ISP Remand Order* went on to create an interim regime where  
17 “reciprocal compensation rates for ISP-bound calls were capped, with the rate cap declining  
18 over time towards zero.” *Peevey*, 462 F.3d at 1147. In conjunction with the filing of the *ISP*  
19 *Remand Order*, the FCC issued a notice of proposed rulemaking to decide whether to abolish  
20 the entire system of reciprocal compensation in favor of a bill-and-keep regime to create  
21 continuity and remove the vulnerabilities of the current system. *In re Core Commc’ns*, 455  
22 F.3d at 272-3 (citing *Notice of Proposed Rulemaking, In the Matter of Developing a Unified*  
23 *Intercarrier Compensation Regime*, 16 F.C.C.R. 9610, 2001 WL 455872 (Apr. 27, 2001)).  
24 Thus, with the ultimate goal of moving towards a bill-and-keep regime, the *ISP Remand*  
25 *Order* created rate caps, market caps, the mirroring rule, and the new markets rule, all in an  
26 effort to slowly wean the CLECs off of reciprocal compensation for ISP-bound traffic. *Id.*  
27 at 273-74. For the purposes of this Order it is unnecessary to examine the details of the  
28 aforementioned provisions of the interim regime. However, the goal of the FCC actions in

1 the *Declaratory Ruling* and the subsequent *ISP Remand Order*, to “move aggressively to  
2 eliminate arbitrage opportunities presented by the existing recovery mechanism for ISP-  
3 bound traffic,” is of paramount importance. *ISP Remand Order*, 16 F.C.C.R. at 9156, ¶ 7.<sup>1</sup>

4 <sup>2</sup>

### 5 3. Virtual NXX (“VNXX”) ISP-Bound Traffic

6 At the crux of the dispute in this case are Level 3 and Pac-West’s use of VNXX  
7 technology for the transport of ISP-bound calls. The national system of telephone numbering  
8 is designed so that the first six digits of each ten digit telephone number correspond to the  
9 physical location of the customer to whom the number is assigned. *Peevey*, 462 F.3d at  
10 1147-48; *see also Global NAPs I*, 444 F.3d at 63-64; *Global NAPs, Inc. v. Verizon New*  
11 *England, Inc.*, 454 F.3d 91, 96 (2d Cir. 2006) (“*Global NAPs II*”). The industry uses the  
12 following format: NPA-NXX-XXXX to route telephone calls and to determine how those  
13 calls should be billed to the customer and compensated from carrier to carrier. *Id.* As

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14  
15 <sup>1</sup>In *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), the D.C. Circuit rejected  
16 the FCC’s reasoning given in the *ISP Remand Order*, holding that it was error to exclude  
17 ISP-bound traffic from reciprocal compensation based upon the language of § 251(g).  
18 Despite finding that the FCC’s logic was faulty, the D.C. Circuit left in place the interim  
19 rules created by the *ISP Remand Order*. *Id.* at 434. Rather than vacate the order, the court  
20 remanded the decision back to the FCC for further consideration based upon its belief that  
“there is plainly a non-trivial likelihood that the Commission has authority to elect such a  
system (perhaps under §§ 251(b)(5) and 252(d)(B)(i)).” *Id.* Therefore, “the *ISP Remand*  
*Order* remains binding.” *Peevey*, 462 F.3d at 1147 n.1.

21 <sup>2</sup>Following *WorldCom*, in July 2003 Core Communications petitioned the FCC to  
22 forbear from applying the four interim provisions set forth in the *ISP Remand Order*. *In re*  
23 *Core Commc’ns*, 455 F.3d at 274; *see Pet. of Core Commc’ns, Inc. for Forbearance Under*  
24 *47 U.S.C. § 160(c) from Application of the ISP Remand Order*, 19 F.C.C.R. 20179, 2004 WL  
25 2341235 (Oct. 18, 2004) (“*Core Forbearance Order*”). After considering the continuing  
26 necessity of the interim provisions, the FCC determined that the rate caps and the mirroring  
27 rule remained vital to furthering the objectives articulated in the *ISP Remand Order*. *In re*  
28 *Core Commc’ns*, 455 F.3d at 275. In contrast, the Commission concluded that the new  
markets rule and the growth caps had been obviated by recent trends in the ISP market,  
writing “[m]arket developments since 2001 have eased the concerns about growth of dial-up  
ISP traffic.” *Id.* (quoting *Core Forbearance Order*, 19 F.C.C.R. 20186, ¶ 20). On appeal,  
the D.C. Circuit upheld the Commission’s decision. *See generally Id.*

1 intended, the first three digits, the numbering plan area (commonly called the area code), and  
2 the middle three digits, the exchange code, are assigned based upon physical location. *Id.*  
3 Under this system, when a customer assigned a particular NPA-NXX calls a second customer  
4 with a different NPA-NXX, the call will be compensated as an interexchange call subject to  
5 access charges if it migrates beyond the bounds of the local calling area. *Id.* Despite the  
6 geographical correlation of NPA-NXX codes to customers, technology permits carriers to  
7 assign virtual NPA-NXX codes—where the NPA-NXX bears no relation to the physical  
8 location of the customer. *Id.*

9 CLECs employ VNXX technology allowing them to provide local numbers to ISPs  
10 whose physical equipment resides in one centralized location. *Id.* Under this arrangement,  
11 ISPs avoid the inconvenience of having to locate their equipment in each distinct NPA-NXX  
12 area, ISPs' customers gain convenient access to the Internet without paying toll charges for  
13 the call, and it allows the CLECs to advance an argument—as they do here—that these calls  
14 are local calls because the NPA-NXX number initiating the call is assigned to the same local  
15 calling area as the NPA-NXX number receiving the call.

16 VNXX traffic is of special significance because it defies normal classification under  
17 either the access charge or reciprocal compensation regimes. *See Global NAPs II*, 454 F.3d  
18 at 100-01. Determining which area of intercarrier compensation VNXX calls fall under is  
19 of critical importance to the parties before this Court. If compensated pursuant to the access  
20 charge system used for calls placed outside the caller's local calling area, the originating  
21 LEC—generally an ILEC such as Qwest—will receive compensation for the phone call.  
22 However, if this traffic were subject to either the reciprocal compensation scheme or the  
23 capped scheme created by the *ISP Remand Order*, then Qwest would pay compensation to  
24 the terminating LEC—generally a CLEC such as Pac-West or Level 3.

25 Qwest's arguments in this case revolve solely around Pac-West and Level 3's use of  
26 VNXX, and can be summed up rather succinctly: Qwest believes that VNXX calls should  
27 be treated as long distance calls subject to the access charge regime. Qwest does not argue  
28 that VNXX technology is ineffective nor does it claim that allowing an ISP to locate its

1 equipment in one central facility is inefficient, it simply argues that the use of VNXX is  
2 designed to skirt the statutorily preserved access charge regime unfairly depriving Qwest of  
3 compensation for use of its infrastructure.

4 **B. Arizona Corporation Commission Decisions**

5 **1. Pac-West v. Qwest, ACC Decision No. 68820**

6 The proceedings before the ACC were initiated by Pac-West to redress what it  
7 believes to be Qwest's breach of the parties' interconnection agreement ("Pac-West ICA")  
8 and the ISP Amendment to the Pac-West ICA. (ACC R., *Pac-West Telecomm, Inc. v. Qwest*  
9 *Commc'ns*, Docket Nos. T-01051B-05-0495, T-03693A-05-0495 ("P-W R."), ACC Decision  
10 No. 68820 ("ACCD"), at 1.) The central question presented to the ACC was "whether  
11 VNXX ISP-bound traffic is eligible for reciprocal compensation under the [Pac-West] ICA,  
12 the ISP Amendment, and the *ISP Remand Order*." (P-W R., ACCD at 8, ¶ 20.)

13 The ACC began its decision by noting that "the precise classification of VNXX traffic  
14 remains unsettled" because "jurisprudence at the federal level is inconclusive, and state  
15 jurisprudence is conflicting." (P-W R., ACCD at 8, ¶ 20.) Relying primarily on language  
16 found in *Global NAPs I*, and emphasizing the unsettled nature of the law, the ACC concluded  
17 that the *ISP Remand Order* could be interpreted to include VNXX calls. (P-W R., ACCD  
18 at 9-10, ¶ 25.) After it reached the conclusion that the *ISP Remand Order* may be read to  
19 include VNXX traffic, the ACC turned to the issue of the Pac-West ICA and ISP  
20 Amendment. The ACC found pursuant to Sections 2 and 5 of the ISP Amendment that  
21 "[t]he plain language of the ISP Amendment provides for reciprocal compensation for all  
22 ISP-bound traffic." (P-W R., ACCD at 10, ¶ 26.) Without any indication that the ISP  
23 Amendment was intended to "exclude VNXX ISP-bound traffic, [the ACC] f[ound] that such  
24 traffic should be subject to reciprocal compensation under the terms of the ICA and ISP  
25 Amendment." (P-W R., ACCD at 10, ¶ 26.) As a result of the decision, the ACC determined  
26 that Qwest had "breached the terms of the ICA and ISP Amendment," and it ordered Qwest  
27 to pay reciprocal compensation to Pac-West as outlined in the decision. (P-W R., ACCD at  
28 10-11, ¶¶ 28, 14.)



1 Sensing that the VNXX issue would continue to present difficulties and only create  
2 further disputes between telecommunications companies in Arizona, the ACC added the  
3 following observation as well as an order to the same effect:

4 Because the issue of VNXX has now come before the  
5 Commission more than once, and we anticipate that it will  
6 continue to be an issue in the future, we will order Staff to open  
7 a generic docket to investigate and make recommendations in  
8 the form of a Staff Recommendation to the Commission  
9 regarding VNXX. Issues to be addressed by Staff should  
10 include what rates are applicable on an ongoing basis; whether  
11 VNXX results in misassigned local telephone numbers; and  
12 whether VNXX results in misused telephone numbering  
13 resources.

14 (P-W R., ACCD at 11, ¶¶ 29, 14.)

15 **2. Level 3 v. Qwest, ACC Decision No. 68855**

16 One month later, on July 28, 2006, the ACC issued a second order, this time to resolve  
17 a virtually identical complaint to the one addressed in the Pac-West matter. In the complaint  
18 filed with the ACC, Level 3 argued that Qwest had breached the Interconnection Agreement  
19 (“L 3 ICA”), and the accompanying ISP Amendment, by failing to pay the agreed upon rate  
20 of reciprocal compensation for ISP-bound VNXX traffic. (*See generally* ACC R., *Level 3*  
21 *Commc’ns, LLC v. Qwest Commc’ns*, Docket Nos. T-01051B-05-0415, T-03654A-05-0415  
22 (“L 3 R.”), ACC Decision No. 68855 (“ACCD”).)

23 Focusing on the plain language of the ISP Amendment, the ACC held that the  
24 agreement “does not carve out, or except, VNXX ISP-bound traffic.” (L 3 R., ACCD at 13,  
25 ¶ 54.) The Commission then looked to the *ISP Remand Order*, which controls the definition  
26 of the term “ISP-bound traffic” as it is used in the ISP Amendment, and found that “the  
27 FCC’s *ISP Remand Order* do[es] not limit the compensation scheme to only ISP-bound calls  
28 that originate and terminate in the same LCA.” (L 3 R., ACCD at 13, ¶ 55.) The ACC  
further supported its decision by citing *Global NAPs P’s* holding “that the *ISP Remand Order*  
does not preempt state authority to regulate intercarrier compensation for all ISP-bound  
traffic.” (L 3 R., ACCD at 13, ¶ 57.) Finally, the Commission pointed to the FCC’s own  
statement that the *ISP Remand Order* could be read to either support or oppose the argument

1 that VNXX traffic was addressed by the *ISP Remand Order*, and the FCC declined to opine  
2 which position was the better reading. (L 3 R., ACCD at 13, ¶ 55.) Thus, the ACC ordered  
3 Qwest to compensate Level 3 in a manner consistent with the order and further ordered Level  
4 3 to discontinue use of VNXX technology per its resolution of an earlier case involving the  
5 parties. (L 3 R., ACCD at 14-15.)

### 6 C. Requested Relief

7 On September 6, 2006, Qwest filed this action seeking declaratory and injunctive  
8 relief from the orders of the ACC. Qwest has requested, among other relief, that the Court  
9 vacate the orders of the ACC issued in Decision Nos. 68820 and 68855; declare that the *ISP*  
10 *Remand Order* does not include VNXX ISP-bound traffic; and order Level 3 and Pac-West  
11 to refund monies that Qwest contends were paid in excess of its obligations under the  
12 agreements. After extensive briefing and consideration of the parties' oral arguments, the  
13 Court now turns to address the issues.

## 14 II. LEGAL STANDARDS AND ANALYSIS

### 15 A. Jurisdiction

16 The ACC has jurisdiction to arbitrate interconnection agreements under 47 U.S.C. §  
17 252(b). *U.S. W. Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n*, 255 F.3d 990, 993 (9th  
18 Cir. 2001). Review by this Court is provided under 47 U.S.C. § 252(b) and 28 U.S.C. §§  
19 1331, 1337. *Id.*

### 20 B. Standard of Review

21 The district courts review *de novo* state agency interpretations and applications of  
22 federal telecommunications law. *See Peevey*, 462 F.3d at 1147 (citing *U.S. W. Commc'ns*,  
23 255 F.3d at 994). "A state agency's interpretation of federal statutes is not entitled to the  
24 deference afforded a federal agency's interpretation of its own statutes under *Chevron U.S.A.*  
25 *Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 843 (1984)." *Orthopaedic*  
26 *Hosp. v. Belshe*, 103 F.3d 1491, 1495 (1997). All other determinations, including those of  
27 contract interpretation, are reviewed under the arbitrary and capricious standard. *Peevey*, 462  
28 F.3d at 1147. "A state commission's decision is arbitrary and capricious if the decision 'was

1 not supported by substantial evidence,' or the commission made a 'clear error of judgment.'"  
2 *Id.* (quoting *U.S. W. Commc'ns*, 255 F.3d at 994).

3 **C. Qwest v. Level 3**

4 The ISP Amendment to the L 3 ICA controls the relationship between the parties.  
5 Thus, before moving beyond the four corners of that document, it is necessary to determine  
6 whether the contract addresses VNXX ISP-bound traffic. The relevant language from the  
7 ISP Amendment reads: "The Parties agree to exchange all EAS/local (§ 251(b)(5)) and ISP-  
8 bound traffic (as that term is used in the FCC ISP Order) at the FCC ordered rate pursuant  
9 to the FCC ISP Order." (L 3 R., ACCD at 4, ¶ 22.) It is readily apparent that in order to give  
10 meaning to the term "ISP-bound traffic," as that phrase is used in the ISP Amendment, it is  
11 necessary to examine precisely how "that term is used in the FCC *ISP [Remand] Order*."  
12 (L 3 R., ACCD at 4, ¶ 22.) Only through a comprehensive review of the *ISP Remand Order*  
13 can the Court determine whether the FCC intended to include VNXX traffic within the  
14 compensation regime created by that order.

15 **1. The *ISP Remand Order's* Applicability to ISP-Bound VNXX Traffic**

16 Qwest argues that the ACC has misinterpreted the scope of the *ISP Remand Order* by  
17 applying it to VNXX traffic. Specifically, Qwest contends that the Commission failed to  
18 properly apply relevant case law and ignored key provisions of the *ISP Remand Order* which  
19 demonstrate that the FCC was attempting to deal solely with ISP-bound calls that originate  
20 and terminate within a single local calling area. In addition, Qwest argues that VNXX calls  
21 are not local and, therefore, are subject to access charges.

22 In opposition, Level 3 contends that the *ISP Remand Order* applies to all ISP-bound  
23 calls, regardless of whether they are VNXX. In support of this position, Level 3 points to the  
24 language used in the *ISP Remand Order* and the context in which it was decided. Level 3  
25 also challenges as fundamentally flawed any characterization of VNXX traffic that would  
26 place it within the access charge regime. Finally, Level 3 claims that both public policy and  
27 recent court cases support its interpretation of the *ISP Remand Order*.

28

1 Conducting a review of the regulatory history, context, policy considerations and  
2 specific language used in the *ISP Remand Order* is critical to gain an understanding of its  
3 breadth. Because the *ISP Remand Order* makes no mention of VNXX, it is imperative that  
4 any reviewing court look to these crucial elements. The ACC's failure to conduct such an  
5 examination led to its conclusion that VNXX was within the definition of "ISP-bound traffic"  
6 as that term was used in the *ISP Remand Order*. Such an interpretation cannot be supported,  
7 and is therefore in violation of federal law.

8 **a. Regulatory History and Context of the *ISP Remand Order***

9 The reciprocal compensation provisions of § 251(b)(5) apply solely to calls that  
10 originate and terminate in the same local calling area. *ISP Remand Order*, 16 F.C.C.R. at  
11 9159, ¶13. In its *Declaratory Ruling* and the subsequent *ISP Remand Order*, the FCC's  
12 primary purpose was to consider whether ISP-bound calls *subject to reciprocal compensation*  
13 *under the current regime* had a basis in law to be excluded from the requirements of §  
14 251(b)(5). The only ISP-bound calls that could possibly have been subject to reciprocal  
15 compensation were those originating and terminating within the same local calling area.  
16 Thus, the *ISP Remand Order* did not address ISP-bound calls subject to access charges. *See*  
17 *Global NAPs II*, 454 F.3d at 100 ("the FCC promulgated t[he *ISP Remand*] [*O*rder  
18 specifically to address only the issue of reciprocal compensation for ISP-bound traffic.") An  
19 argument to the contrary would have to embrace the impossibility that the FCC was  
20 considering removing ISP-bound toll calls from the reciprocal compensation regime when  
21 those calls were not subject to reciprocal compensation in the first place.

22 This leaves the question of whether VNXX was ever subject to reciprocal  
23 compensation under § 251(b)(5) prior to the entry of the *ISP Remand Order*. The  
24 classification of VNXX traffic as either local, long distance, or some other non-traditional  
25 type of traffic is the responsibility of either the FCC or the ACC. In fact, the ACC has  
26 recognized this and has taken the initiative to establish a generic docket to address the issue.  
27 (*See P-W R.*, ACCD at 11, ¶¶ 29, 14.) None of this, however, allows the Court to avoid the  
28 reality that VNXX has yet to be designated as a certain type of traffic, or dealt with in any

1 way by the organizations possessing expertise in the regulation of telecommunications.  
2 Without a finding that a VNXX call in Arizona is local—i.e., a call that actually originates and  
3 terminates within a local calling area—the Court cannot determine whether VNXX logically  
4 fits within the class of ISP-bound calls that spurred the FCC to take action to remove those  
5 calls from the purview of § 251(b)(5).

6         Within a few years of the 1996 enactment of the TCA, the FCC embarked on a course  
7 of action to remove ISP-bound traffic from the Act’s reciprocal compensation regime—first  
8 in the *Declaratory Ruling* and later in the *ISP Remand Order*—because of its desire to  
9 eliminate the “enormous incentive for CLECs to target ISP customers.” *ISP Remand Order*,  
10 16 F.C.C.R. at 9183, ¶ 70. Due to the intercarrier compensation scheme created by §  
11 251(b)(5), CLECs had an “incentive to target [ISPs] with little regard to the costs of serving  
12 them.” *Id.* at 9183, ¶ 69. Based upon the findings of the FCC, this is exactly what CLECs  
13 did, and it resulted in a windfall for CLECs while damaging ILECs and their customers who  
14 do not use dial up Internet services. Evidence considered by the FCC in issuing the *ISP*  
15 *Remand Order* demonstrates that “CLECs, on average, terminate eighteen times more traffic  
16 than they originate, resulting in annual CLEC reciprocal compensation billings of  
17 approximately two billion dollars, ninety percent of which is for ISP-bound traffic.” *Id.* at  
18 9183, ¶ 70. This evidence led the FCC to conclude that “CLECs target ISPs in large part  
19 because of the availability of reciprocal compensation,” not because of a legitimate free-  
20 market-based desire to serve ISPs. *Id.* As a result of this regulatory arbitrage, a CLEC can  
21 charge rates to its ISP customers “that bear little relationship to its actual costs, thereby  
22 gaining an advantage over its competitors.” *Id.* at 9182, ¶ 68. This practice not only results  
23 in market distortions, it also harms the customers of LECs who are forced to bear the  
24 increased costs associated with the extreme imbalance in reciprocal payments to CLECs. *Id.*  
25 Consumers are not charged based upon the amount of reciprocal billing that is paid on their  
26 behalf, instead the costs of all local callers are averaged into the price charged to all  
27 customers of the LEC. *Id.* Thus, a customer who makes and receives only voice calls will  
28

1 bear the increased costs incurred by the LEC's customers who direct much of their traffic to  
2 ISPs. *Id.*

3 While the *ISP Remand Order* can easily be faulted for failing to address VNXX  
4 traffic, it does not waver in its depiction of the factual context and the regulatory posturing  
5 that served as the catalyst for FCC action. In the *ISP Remand Order*, the FCC's motivation  
6 was to eliminate regulatory arbitrage and distorted markets that arose from the inclusion of  
7 ISP-bound traffic in the reciprocal compensation system applicable to calls originated and  
8 terminated by LECs *within the same local calling area*. The regulatory history does not  
9 support, as Level 3 contends, that the FCC was actually removing all ISP-bound calls,  
10 regardless of classification, from the reciprocal compensation versus access charge  
11 dichotomy and in place creating a separate class of traffic that would be controlled  
12 exclusively by the terms of the *ISP Remand Order*. At the base of Level 3's argument is the  
13 contention that "the FCC rejected the idea that the status of traffic as 'local' has any  
14 relevance to reciprocal compensation under Section 251(b)(5)." (Level 3 Commc'ns, LLC's  
15 Opening Brief ("L 3 Brief") at 21.) This argument, which is addressed in detail below, finds  
16 no support in the language or regulatory history of the *ISP Remand Order* and, for that  
17 reason, it fails.

18 **b. Essential Language of the *ISP Remand Order***

19 The plain language of the *ISP Remand Order* reveals that the FCC's objective was to  
20 determine "whether reciprocal compensation obligations apply to the delivery of calls from  
21 one LEC's end-user customer to an ISP *in the same local calling area* that is served by a  
22 competing LEC." *ISP Remand Order*, 16 F.C.C.R. at 9159, ¶13 (emphasis added). VNXX  
23 ISP-bound traffic, by definition, involves an ISP located outside the caller's local calling  
24 area. Appearing in the "Background" section, this unambiguous statement is a description  
25 of the original question presented in the *Declaratory Ruling*. This statement has been  
26 attacked as being taken out of context, however, it is precisely the setting from which it was  
27 taken which gives it such force.

28

1           When the FCC answered the question presented in the *Declaratory Ruling* it was  
2 subsequently overturned on appeal and remanded to the Commission. On further  
3 consideration, the FCC issued the *ISP Remand Order* wherein it achieved the same result,  
4 albeit using a new analysis. Any argument challenging the continuing validity of the original  
5 question presented must presume that somehow the issue before the FCC was significantly  
6 broadened on appeal—from mere consideration of a single area of ISP-bound traffic to all  
7 ISP-bound calls, without so much as indicating once that it was doing so. If the Court were  
8 to adopt Level 3's position, then it would implicitly recognize that the FCC acted in violation  
9 of the principle “that an agency choosing to alter its regulatory course ‘must supply a  
10 reasoned analysis indicating that its prior policies and standards are being deliberately  
11 changed, not casually ignored.’” *Action for Children’s Television v. FCC*, 821 F.2d 741, 745  
12 (D.C. Cir. 1987) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C.  
13 Cir.1970)). The Court finds no evidence that the FCC contravened administrative law  
14 principles by silently expanding the scope of its action.

15           Unsurprisingly, the FCC’s failure to clarify the scope of its action extends to its  
16 treatment of VNXX, a term that appears nowhere in the *ISP Remand Order*. To explain how  
17 the Commission addressed a form of telecommunications traffic without making mention of  
18 it, Level 3 posits that no such reference was required because the FCC was addressing the  
19 entire spectrum of ISP-bound calls, obviating the need for discussion of specific sub-classes,  
20 such as VNXX. Underlying this theory is Level 3's central argument: that the *ISP Remand*  
21 *Order* destroyed the distinction between “local” and “non-local” traffic, and instead created  
22 a separate regime under which all ISP-bound calls are subject to the compensation scheme  
23 created by the *ISP Remand Order*.

24           In the *ISP Remand Order* the FCC recognized that the “use of the phrase ‘local  
25 traffic’” in the *Local Competition Order* and the *Declaratory Ruling* has “created  
26 unnecessary ambiguities,” and, thus, it decided to discontinue use of those terms when  
27 distinguishing between types of traffic. *ISP Remand Order*, 16 F.C.C.R. at 9173, ¶ 46.  
28 Instead, the FCC concluded that calls are more properly classified either as calls subject to

1 § 251(b) or calls excepted from that regime by § 251(g). *Id.* at 9172, ¶ 46. In rejecting the  
2 “local” versus “non-local” language, the FCC was simply implementing the D.C. Circuit’s  
3 admonition that using such a distinction was an impermissible way to except certain ISP-  
4 bound traffic from the coverage of § 251. The FCC explained this failed logic as follows:  
5 “[t]here is no dispute that the Commission has historically been justified in relying on this  
6 [end-to-end] method when determining whether a particular communication is  
7 jurisdictionally interstate,’ [however,] the Commission had not adequately explained why the  
8 jurisdictional analysis was dispositive of, or indeed relevant to, the question whether a call  
9 to an ISP is subject to the reciprocal compensation requirements of section 251(b)(5).” *Id.*  
10 at 9160-61, ¶ 16.

11 Level 3 places great weight on the FCC’s rejection of the “local” distinction, but this  
12 reliance is misplaced. In its argument, Level 3 writes, “[c]learly it makes no sense to  
13 interpret the *ISP Remand Order* as establishing a compensation regime limited to ‘local’  
14 traffic (as somehow defined) when the FCC over and again repudiated any reliance on that  
15 terminology.” (L 3 Brief at 24.) Although it may not make sense to distinguish “local”  
16 traffic, it makes perfect sense to separate § 251(b)(5) traffic from traffic falling under the §  
17 251(g) exception. In one sense, Level 3 is correct—the *ISP Remand Order* did not “establish  
18 a compensation regime limited to ‘local’ traffic.” (L 3 Brief at 24.) It did, however, establish  
19 a compensation regime limited to § 251(b)(5) traffic. This is fatal to Level 3’s argument  
20 because neither the FCC nor the ACC have ever decided that VNXX traffic is subject to §  
21 251(b)(5), and there remains the possibility that VNXX is instead subject to the access  
22 charges preserved by § 251(g), an area outside of the scope of the *ISP Remand Order*. *See*  
23 *Global NAPs II*, 454 F.3d at 101 (noting that “[V]NXX’s potential compensation  
24 arrangement . . . [could] possibly involve toll and access charges[] [which] would differ from  
25 that contemplated in the 2001 *ISP Remand Order*”).

26 **c. Public Policy & the *ISP Remand Order***

27 An examination of the public policy concerns underlying the *ISP Remand Order*  
28 illuminates the FCC’s intentions and further undermines Level 3’s arguments. Both Level



1 3 and Qwest advance public policy arguments, however, Level 3's position distorts the facts  
2 and confounds common sense. Level 3 argues that the Commission's concerns were twofold,  
3 "dealing with marketplace distortions . . . and establishing a unified regime for intercarrier  
4 compensation." (L 3 Brief at 26 (citing *ISP Remand Order*, 16 F.C.C.R. at 9155-56, ¶ 7).)  
5 Surprisingly, paragraph 7 of the *ISP Remand Order* contains no mention of "establishing a  
6 unified regime for intercarrier compensation." It does, however, provide the following: "[i]n  
7 sum, our goal in this Order is decreased reliance by carriers upon carrier-to-carrier payments  
8 and an increased reliance upon recovery of costs from end-users." *ISP Remand Order*, 16  
9 F.C.C.R. at 9155-56, ¶ 7. Creating a unified intercarrier compensation regime may be one  
10 of the overall goals of the Commission, but it is not the policy concern that motivated it to  
11 issue the *ISP Remand Order*.

12 From a policy perspective, Level 3's argument that all ISP-bound traffic should be  
13 compensated pursuant to the *ISP Remand Order* regime is simply untenable. If this  
14 interpretation were deemed credible, then the FCC would be placing *additional* traffic into  
15 a carrier-to-carrier payment scheme—the exact practice that the FCC was attempting to  
16 eliminate. A more logical conclusion is that the FCC intended to exclude both VNXX and  
17 ISP-bound traffic subject to access charges. For ISP-bound traffic subject to access charges,  
18 inclusion within the *ISP Remand Order* compensation system would only create additional  
19 opportunities for regulatory arbitrage, this certainly could not have been the Commission's  
20 intent.

21 **d. Subsequent Statements by the FCC Concerning the *ISP***  
22 ***Remand Order***

23 In *Global NAPs I*, the First Circuit invited the FCC to submit a brief as *amicus curiae*  
24 to address whether the *ISP Remand Order* preempts state regulation of VNXX ISP-bound  
25 calls. *Global NAPs I*, 444 F.3d at 74. The FCC's brief acknowledges the ambiguity inherent  
26 in the expansive language of the order and opines that, on its face, "the *ISP Remand Order*  
27 appears to address all calls." *Global NAPs I*, Brief for *Amicus Curiae* FCC, 2006 WL  
28 2415737, at \*11. Yet, when taken in context of the administrative history, the FCC wrote

1 that “the Commission was considering only calls placed to ISPs located in the same local  
2 calling area as the caller.” *Id.* at \*10. The *ISP Remand Order*, however, does not stand in  
3 a vacuum—which is the only setting where Level 3's argument could survive.

4 After recognizing the *ISP Remand Order*'s lack of clarity concerning the intended  
5 reach of the FCC's action, the FCC's brief recounted the administrative actions leading up  
6 to the *ISP Remand Order*. *Id.* at \*12. Beginning with the *Local Competition Order* and  
7 again in the *Declaratory Ruling*, the FCC was “focused on calls between dial-up users and  
8 ISPs in a single local calling area.” *Id.* In spite of the historical evidence supporting the  
9 conclusion that the FCC never expanded its analysis beyond calls originating and terminating  
10 in the same local calling area, Defendants cling to the FCC's acknowledgment that “[t]he ISP  
11 Remand Order . . . can be read to support the interpretation set forth by either party.” *Id.* at  
12 \*13. While either reading may be permitted, only one finds significant support in the  
13 administrative history preceding the *ISP Remand Order*. Tellingly, the FCC concluded by  
14 noting that “the Commission did not directly address VNXX calls in either of its ISP orders  
15 and has not addressed VNXX calls more generally.” *Id.* Any likelihood that the FCC  
16 intended to indirectly address VNXX ISP-bound traffic is heavily outweighed by the  
17 evidence which supports a more limited reading, and the FCC's *amicus brief* further supports  
18 the Court's conclusion in this regard.

19 **e. Relevant Case Law Interpreting the *ISP Remand Order***

20 In each instance that the United States appellate courts have addressed VNXX traffic,  
21 the courts have recognized that the FCC's analysis in the *ISP Remand Order* was limited to  
22 traffic carried from a caller located within the same local calling area as the terminating ISP.  
23 *Global NAPs I*, 444 F.3d at 73-74 (quoting *ISP Remand Order*, 16 F.C.C.R. at 9159, ¶ 13)  
24 (“The issue that necessitated FCC action in the [*Declaratory Ruling*] and the *ISP Remand*  
25 *Order* was ‘whether reciprocal compensation obligations apply to the delivery of calls from  
26 one LEC's end-user customer to an ISP in the same local calling area that is served by a  
27 competing LEC.’”); *Global NAPs II*, 454 F.3d at 99 (“The ultimate conclusion of the 2001  
28 [*ISP*] *Remand Order* was that ISP-bound traffic within a single calling area is not subject to

1 reciprocal compensation. . . . Although the 2001 Remand Order states explicitly that ISPs  
2 are exempt from reciprocal compensation for intra-local calling area calls, it sheds little light  
3 on inter-local calling area calls or access fees.”); *Peevey*, 462 F.3d at 1158-59 (finding the  
4 rate caps imposed by the *ISP Remand Order* irrelevant to the issue of intercarrier  
5 compensation for VNXX ISP-bound traffic because “[t]hose rate caps are intended to  
6 substitute for the reciprocal compensation that would otherwise be due to CLECs for  
7 terminating *local* ISP-bound traffic.”) (emphasis added); *In re Core Commc’ns*, 455 F.3d  
8 at 272 (recounting the holding of the *ISP Remand Order* and recognizing that it applies to  
9 “calls made to ISPs located within the caller’s local calling area”); *Worldcom*, 288 F.3d at  
10 430 (“In the [*ISP Remand Order*] the [FCC] held that under § 251(g) of the Act it was  
11 authorized to ‘carve out’ from § 251(b)(5) calls made to Internet service providers (“ISPs”)  
12 located within the caller’s local calling area.”).

13         Recognizing the significance of these cases, Level 3 devotes some fifteen pages of its  
14 Reply to arguments that attempt to distinguish each case factually from the situation  
15 presented to this Court. In doing so, Level 3 misses the point. The Court does not rely on  
16 these cases for their primary holdings, none of which address the precise issue presented  
17 here. Instead, each case, either in the background or analysis, identifies the scope of the  
18 FCC’s action in the *ISP Remand Order*, which is of primary interest to the Court. Each  
19 decision makes reference to the fact that in drafting the *ISP Remand Order*, the FCC was  
20 only considering calls placed by a caller in the same local calling area as the terminating  
21 LEC’s ISP customer, and, for that reason alone, these circuit court cases are highly relevant  
22 to the dispute in this case.

## 23                   **2. Conclusion**

24         Regrettably, in this instance, the rapid proliferation of ever evolving  
25 telecommunications technology has outpaced the regulatory framework within which it must  
26 operate. The result is a technology which defies certain assumptions intrinsic in the present  
27 statutory scheme. Nevertheless, it is impermissible to attribute an intention to the FCC that  
28 may make sense in retrospect, but clearly was not part of the analysis at the time the order

1 was entered. Perhaps the most sensible observation made in Level 3's brief is the realization  
2 that "VNXX traffic does not fit the traditional 'local' model, but it is equally plain that this  
3 traffic does not fit the traditional model of a 'long distance' call either." (L 3 Brief at 26.)  
4 The Court is in complete agreement. This is precisely the reason that the Court cannot  
5 conclude that the FCC intended to include VNXX traffic within the definition of the term  
6 "ISP-bound traffic" in the *ISP Remand Order*. The Court has determined that the FCC  
7 intended to remove ISP-bound traffic from the confines of § 251(b)(5), but only in regards  
8 to traffic that was subject to such reciprocal payments before the issuance of the *ISP Remand*  
9 *Order*. Whether VNXX traffic was among the calls subject to such reciprocal payments is  
10 not a question that this Court can answer. Until such time that VNXX is addressed by the  
11 ACC, the parties' dispute cannot be resolved.

12 For all of the reasons given above, the term "ISP-bound traffic" as it appears in the  
13 ISP Amendment incorporates the definition from the *ISP Remand Order*, which did not  
14 address VNXX traffic. To the extent that the ACC's ruling in the Level 3 matter conflicts  
15 with this determination, it is in violation of federal law.

16 **D. Qwest v. Pac-West**

17 Although the Pac-West ISP Amendment and the Level 3 ISP Amendment do not  
18 mirror each other, an examination of the relevant contract terms leads the Court to the same  
19 result. As above, the Court looks first to the parties' agreement to determine whether it can  
20 be enforced as written, or whether it necessitates interpretation of federal law to give  
21 meaning to its essential terms.<sup>3</sup> In its order, the ACC wrote that it "base[d] its decision . . .

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22  
23 <sup>3</sup>At oral argument, Defendants reasoned that any contractual ambiguity concerning  
24 VNXX should be construed against Qwest, the party allegedly responsible for drafting the  
25 ISP Amendments. (*See also* Reply Br. of Pac-West Telecomm, Inc. ("P-W Reply") at 7.)  
26 In support thereof, Defendants directed the Court to the level of specificity found in the  
27 change of law provision (section 6) of the Pac-West ISP Amendment, which illustrates the  
28 precision used in drafting the agreement. Defendants suggest that Qwest, had it actually  
meant to exclude VNXX traffic from the ISP Amendment, had ample opportunity to do so  
at the time of formation of the agreement.

The Court agrees with Defendants' general premise, but finds that their own actions

1 on the plain language of the specific contract terms.” (P-W R., ACCD at 10, ¶ 26.) Upon  
2 review of the specific contract terms, however, it is clear that the plain language mandates  
3 interpretation of the *ISP Remand Order* to give meaning to the disputed term, “ISP-bound.”  
4 The relevant contract provision states: “Qwest elects to exchange ISP-bound traffic at the  
5 FCC ordered rates pursuant to the [*ISP Remand Order*].” (P-W Reply, Ex. 1 (“P-W ISP  
6 Amendment”) at 2, § 3.1.) The term “ISP-bound” is defined in the contract as follows:  
7 “‘ISP-Bound’ is as described by the FCC in its [*ISP Remand Order*].” (P-W ISP  
8 Amendment at 2, § 1.4.)

9 No permissible interpretation of the essential provision can be made without first  
10 establishing exactly what was meant by the FCC when it used the term “ISP-bound” in the  
11 *ISP Remand Order*. Having done that above, it is unnecessary to reexamine the issue as Pac-  
12 West has not advanced any substantially different reasoning in support of its interpretation  
13 of the breadth of the *ISP Remand Order*. Therefore, the Court concludes that the ACC’s  
14 order in the Pac-West matter violates federal law by failing to properly interpret the *ISP*  
15 *Remand Order*, which was fundamental to the ACC’s interpretation of the Pac-West ISP  
16 Amendment.

17 **E. Injunctive and Declaratory Relief**

18 In its Complaint, Qwest identifies eight separate areas of injunctive and declaratory  
19 relief that it asks the Court to grant. (Compl. at 17-18.) However, in its briefing of the  
20 issues, Qwest narrows the requested relief and focuses on three actions it wishes the Court  
21

22  
23  
24 \_\_\_\_\_  
25 undermine the legitimacy of their position. Regardless of which party actually drafted the  
26 agreements, both Qwest and Defendants are highly sophisticated entities who were well  
27 aware of the issues surrounding VNXX at the time of the signing of the ISP Amendments.  
28 In fact, it is the CLECs, not Qwest, who employ this technology and therefore most likely  
have an equal, if not greater, understanding of its implications and risks. None of the parties  
to the ISP Amendments sought to mitigate the risk of future disputes over the use of VNXX,  
and, as a result, they all share in the uncertainty of seeking judicial construction of  
ambiguous contractual terms.

1 to take. (Qwest Corp.'s Reply Br. ("Qwest Reply") at 27.) The Court now turns to discuss  
2 the relief granted.

3 Qwest first asks the Court to declare "that the *ISP Remand Order* prescribes  
4 intercarrier compensation only for calls placed by a caller to an ISP located in the same local  
5 calling area." (Qwest Reply at 27.) As this statement is consistent with the findings above,  
6 it is adopted by the Court and becomes part of this Order. Next, Qwest seeks a "holding that  
7 [ACC] Decision[] Nos. 68820 and 68855 violate Section 251(g) of the [TCA]." (Qwest  
8 Reply at 27.) Qwest's position is premised on its belief that VNXX is covered by § 251(g)  
9 and, therefore, subject to access charges. As explained more fully below, the Court is  
10 instructing the ACC to determine the most appropriate compensation regime for VNXX,  
11 thus, the Court will not enter the order as requested by Qwest. To do so would recognize that  
12 access charges are the method of compensation to be applied to VNXX—that is not the  
13 Court's decision to make. Finally, Qwest seeks an injunction preventing "enforcement of  
14 Decision Nos. 68820 and 68855 because they are based on incorrect interpretations of the  
15 *ISP Remand Order* and the ISP Amendments implementing the *ISP Remand Order*." (Qwest  
16 Reply at 27.) Where the ACC Decisions conflict with the language of this Order, the ACC  
17 is enjoined from enforcing those Decisions. Those portions of the Decisions not in conflict  
18 with this Order remain intact.

19 No party to this action can achieve the ultimate financial result they seek until the  
20 ACC definitively categorizes VNXX.<sup>4</sup> This must occur before any determination can be  
21 made as to which party may be entitled to compensation, or reimbursement, for VNXX ISP-  
22 bound traffic transported since the entry of the *ISP Remand Order*. The ACC may find that  
23 VNXX is local, i.e., it originates and terminates in the same local calling area. In the  
24

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25  
26 <sup>4</sup>In the ordering section of this Order, the Court provides the parties with one final  
27 opportunity to amicably resolve the issue of past and present intercarrier compensation for  
28 VNXX ISP-bound traffic. Should the parties choose to capitalize on this opportunity, it will  
be unnecessary for the Arizona Corporation Commission to undertake the thorough review  
of VNXX traffic contemplated by this section.

1 alternative, the ACC may determine that VNXX is not now, or that it never was, local traffic  
2 subject to reciprocal compensation, and instead that it is subject to access charges. See  
3 *Global NAPs II*, 454 F.3d at 101 (hypothesizing that “[V]NXX’s potential compensation  
4 arrangement . . . [could] possibly involve toll and access charges”); *Global NAPs I*, 444 F.3d  
5 at 72 (holding that “the *ISP Remand Order* does not clearly preempt state authority to impose  
6 access charges for interexchange VNXX ISP-bound traffic”). As a third option, the ACC  
7 could opt for some other yet-to-be defined rate scheme that the ACC deems appropriate.

8 The aforementioned resolutions are intended merely to suggest potential dispositions  
9 of the VNXX issue. They are not exclusive of other equally reasonable potential solutions,  
10 and do not bind the ACC to reach a particular result. The ACC shall deal with VNXX,  
11 however, any decision is to be guided by its own discretion and no party may rely on this  
12 Order to argue that a particular result is required. The Court expresses no opinion as to the  
13 proper resolution of this matter and, as evidenced by the disparate conclusions reached by  
14 other states that have addressed this issue, concludes that more than one reasonable solution  
15 exists.

16 In declaring the intended coverage of the *ISP Remand Order* and requiring the ACC  
17 to make difficult decisions concerning VNXX traffic, the Court fulfills its duty to resolve the  
18 challenged ACC action without stepping into areas best reserved for those with  
19 telecommunications regulatory expertise. In the Pac-West ACC Order, the Commission  
20 stated that it was “disinclined to make a sweeping pronouncement regarding the  
21 appropriateness of VNXX as it relates to intercarrier compensation,” with the source of this  
22 sentiment being its general “unwillingness to determine a matter of such gravity without  
23 broad industry participation.” (P-W R., ACCD at 10, ¶ 27.) So too, this Court is unwilling  
24 to make such a broad pronouncement concerning the character of VNXX traffic.  
25 Additionally, the Ninth Circuit in *Peevey* signaled that it is clearly permissible for state  
26 commissions to address the VNXX issue. *Peevey*, 462 F.3d at 1158 (upholding the state  
27 commission’s actions where it “applied its *own* balancing test in determining as a matter of  
28 fair compensation policy that VNXX traffic is subject to reciprocal compensation as ‘local’

1 traffic; it did not make that determination under the [TCA] or the FCC's rules for reciprocal  
2 compensation”).

3 **IT IS ORDERED** enjoining enforcement of those portions of Arizona Corporation  
4 Commission Decision Nos. 68820 & 68855 that conflict with this Order.

5 **IT IS FURTHER ORDERED** remanding Decision Nos. 68820 & 68855 to the  
6 Arizona Corporation Commission for further consideration and action consistent with the  
7 findings of this Order, specifically Section E, Injunctive and Declaratory Relief.

8 **IT IS FURTHER ORDERED** that those portions of the ordering paragraphs of  
9 Arizona Corporation Commission Decision Nos. 68820 & 68855 not affected by this Order  
10 remain in force.

11 **IT IS FURTHER ORDERED** that the parties have 120 days (commencing the day  
12 of entry of this Order) to resolve their ongoing dispute concerning intercarrier compensation  
13 for VNXX ISP-bound traffic by mutual written agreement as an amendment to their  
14 interconnection agreements.

15 **IT IS FURTHER ORDERED** that, in the event the parties are unable to fully resolve  
16 all past and present issues concerning intercarrier compensation for VNXX ISP-bound  
17 traffic, the Arizona Corporation Commission shall designate intercarrier compensation for  
18 VNXX ISP-bound traffic. The Commission's order must set forth rates of intercarrier  
19 compensation for VNXX ISP-bound traffic retroactive to the date of the *ISP Remand Order*.  
20 This retroactive compensation may change with the progression of time and need not mirror  
21 the future rate scheme. The Commission may address these VNXX issues using the generic  
22 docket opened in Arizona Corporation Commission Decision No. 68820.

23  
24 DATED this 20<sup>th</sup> day of November, 2007.

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26  
27  
28 

Susan R. Bolton  
United States District Judge