BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

QWEST CORPORATION, Complainant, v. LEVEL 3 COMMUNICATIONS, LLC, *et al.*, Respondents.	)	DOCKET UT-063038 PAC-WEST REPLY TO STAFF'S ANSWER TO PETITIONS FOR ADMINISTRATIVE REVIEW AND PETITION FOR LEAVE TO REPLY AND REPLY TO QWEST'S RESPONSE

Pursuant to WAC 480-07-825(5), Pac-West Telecomm, Inc. ("Pac-West") submits this Reply to the Answer to the Petitions for Administrative Review on Behalf of Commission Staff ("Staff Answer") and Petition for Leave to Reply and Reply to Qwest Corporation's ("Qwest's") Response to Petitions for Administrative Review ("Qwest Response") of Order 02 ("Initial Order"). Pac-West replies as a matter of right to Staff's challenges to the Initial Order and seeks leave of the Commission to reply, including Pac-West's proposed reply, to portions of Qwest's Response that raise new, unanticipated issues necessitating a response.

I. INTRODUCTION

1. Both Staff and Qwest stray significantly from the Initial Order and Pac-West's request in its Petition for Administrative Review for a principled, consistent treatment of all FX and FX-like traffic for regulatory purposes. As explained in more detail below, Staff and Qwest ask the Commission to modify or interpret the Initial Order to adopt a results-oriented approach that singles out "VNXX" provisioned FX service for denial of

intercarrier compensation solely on the basis of outdated and unsupported policy concerns, without regard for the discriminatory and anticompetitive effects of such action. The Commission should deny that request.

II. REPLY TO STAFF

A. The Initial Order Correctly Found That Applicable Law Precludes the Commission from Selectively Prohibiting "VNXX" Provisioned FX Service.

2. The Initial Order finds that the federal Telecommunications Act of 1996 ("Act") "may require that VNXX service be permitted as the competitive functional equivalent of FX service," and "the Commission must consider whether under section 253 of the Act, prohibiting VNXX service would constitute an impermissible barrier to competition from CLEC telecommunications companies."[1] Staff challenges this analysis, proposing that the Initial order "should be corrected" because "[t]hese same arguments have been rejected by the courts and the Commission should not rely on them as theories for allowing VNXX."[2] Staff is incorrect.

3. The only case Staff cites fails to support Staff's position. The Second Circuit found that the Vermont Board's "virtual NXX" decision did not violate Section 253, but concluded that "analysis here must proceed on a case-by-case, and while a prohibition of virtual NXX might once have been fatal to Global, its counsel conceded at oral argument that such is no longer the case."[3] The record in this case, in sharp contrast, reflects that Qwest is unaware that it provides any dial-up service for ISPs because those customers

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[1] Initial Order ¶ 77.

[2] Staff Answer ¶ 26.

[3] *Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 102 (2nd Cir. 2006).

obtain their local service from CLECs offering "VNXX" provisioned FX service,[4] so prohibition of such service would effectively eliminate CLECs from that market.

4. The only antidiscrimination argument raised and rejected in the Second Circuit case, moreover, was that "prohibiting virtual NXX violates various federal antidiscrimination statutes by determining which carriers could serve ISPs."[5] Here, however, Pac-West and other CLECs raised the very different claim that prohibiting "VNXX" provisioned FX service would violate both federal and state antidiscrimination statutes because that service is functionally equivalent to FX and FX-like services that Qwest is authorized to provide.[6] Staff cites no court decisions that have rejected that argument, and Pac-West is not aware of any such cases. Nor does Staff provide any of its own analysis of Section 253 specifically, or of federal and state antidiscrimination law in general, to support its claims.

5. The Initial Order properly based its decision not to prohibit "VNXX" provisioned FX service, in part, on the requirements of federal law, and the Commission should not modify that conclusion.

B. The Commission Should Not Revise the Initial Order to Conclude That "VNXX" Provisioned FX Service Is an Interexchange Service.

6. The Initial Order characterizes "VNXX" provisioned FX as a hybrid, having characteristics of both "local" and "long distance" service.[7] Staff repeatedly challenges this reasoning, urging that the Commission "should unequivocally find that VNXX traffic

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[4] Tr. at 301, lines 9-22 (Qwest Brotherson).

[5] *Global NAPs*, 454 F.3d at 101.

[6] *E.g.*, Joint CLEC Opening Brief ¶ 53-59.

[7] Initial Order ¶¶ 47 & 55.

is interexchange traffic because it is not within the local calling area,"[8] "should unequivocally state that VNXX is interexchange traffic to which reciprocal compensation *does not apply* pursuant to federal law,"[9] and should "clarify" the Initial Order "to state that the Commission is *not* setting a reciprocal compensation rate (i.e., a rate of zero) pursuant to the Act."[10] Staff's position is not well taken.

7. Staff's arguments gloss over the fact that the Commission has never established a principled basis on which to determine when a call is "interexchange." Staff contends that "Washington law distinguishes local traffic from interexchange traffic on the basis of the geographic endpoints of the call."[11] Staff, however, cites no statute, rule, or Commission decision stating that a call is "interexchange" if it is not originated and terminated by parties who are both *physically* located within the geographic boundaries of a local calling area. As Pac-West has previously explained, no such statute, rule, or Commission decision exists, and the telecommunications industry has long used telephone numbers, not the physical location of the calling and called parties, to rate and route calls.[12]

8. Staff thus asks the Commission, for the first time, to issue an order defining as "interexchange" all calls that are not originated and terminated within a local calling area

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[8] Staff Answer ¶ 31.

[9] Staff Answer ¶ 29 (emphasis in original). "VNXX" provisioned FX traffic to ISPs, of course, is not, and would not be, subject to "reciprocal compensation" if the Commission determines that this traffic is "within" the local calling area but would fall under the compensation regime established by the FCC in its *ISP Remand Order, In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 F.C.C. Rcd. 9151, 2001 WL 455869 (Apr. 27, 2001). Staff thus is incorrect to the extent that it contends otherwise.

[10] *Id.* (emphasis in original).

[11] Staff Answer ¶ 32.

[12] *E.g.*, Joint CLEC Opening Brief ¶¶ 8-16; Joint CLEC Reply Brief ¶¶ 5-11; Ex. 501T (Pac-West Sumpter Response).

based on the geographic location of the calling and called parties. As Pac-West states in its Petition for Administrative Review, this docket is not the appropriate proceeding to make such broad public policy determinations.[13] Even if the Commission were to address such issues in this docket, the order Staff requests would effectively categorize any FX service, regardless of the carrier providing it, as "interexchange" service. Qwest's market expansion line ("MEL") service under such a definition would also be an "interexchange" service. Indeed, any call forwarded to a party who is physically outside the local calling area in which the call originated would be an interexchange call, as would calls to customers of the Qwest voice over Internet protocol ("VoIP") affiliate to whom Qwest provides call origination and termination service in local calling areas in which that affiliate's IP gateway is not physically located. All of these calls currently are considered "local," at least to the customer who originates the call, but they would need to be reclassified – and intercarrier compensation reassessed – if the Commission were to accept Staff's proposal.

9. Staff largely ignores these consequences. Indeed, Staff recognizes incumbent local exchange carrier ("ILEC") provisioned FX service as the "one key exception" to its blanket rule but dismisses it as "limited to a particular network architecture."[14] Yet network architecture would be irrelevant if the only consideration is the physical location of the parties to the call. Staff similarly has asserted that MEL and other call forwarding features are different than "VNXX" provisioned FX service because they involve two

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[13] Pac-West Petition ¶¶ 4-9.

[14] Staff Answer ¶ 32. Staff presumably includes Qwest VoIP termination service to its affiliate in this scenario because Qwest is effectively providing FX service by provisioning PRI circuits to that affiliate in the local calling area where the telephone numbers are assigned even though the affiliate's IP gateway is not physically located in that local calling area. *See* Staff Opening Brief ¶ 89.

calls – one to the telephone number rated as "local" to the calling party's local calling area and a second call from that telephone number to the telephone number where the called party is actually located. Again, however, that particular network architecture is immaterial. The calling and called parties are physically located in different local calling areas and, under Staff's proposed definition, the entire call path is "interexchange."[15]

10. If Staff were genuinely interested in promoting a principled distinction between "local" and "interexchange" calls under state law, Staff would have proposed intercarrier compensation reform for all calls that are "interexchange" under Staff's definition. Staff, however, apparently requests that the Commission define only "VNXX" provisioned FX service as "interexchange" as a means of exempting that service from the intercarrier compensation obligations that apply to functionally identical services provided by Qwest in order to advance Staff's own policy goals. Indeed, Staff's attempt to distinguish denying intercarrier compensation (which Staff advocates) from setting a compensation rate of "zero" (which Staff asks the Commission not to do) is a distinction without a difference. The Commission should reject such intellectually inconsistent advocacy and Staff's proposed modification to the Initial Order. Instead, the Commission should modify the Initial Order as Pac-West has proposed.

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[15] Indeed, the Commission's toll bridging cases would have been wrongly decided if, when determining the nature of a call, a call-forwarded call were not considered to be a single call from the party who originally places the call to the party who ultimately receives the call. *See also ISP Remand Order* ¶¶ 56-64 ("reject[ing] the two-call theory in the context of calls involving enhanced services," including ISP-bound calls and determining the jurisdiction of such calls "on the basis of the end points of the communication, rather than intermediate points of switching or exchanges between carriers (or other providers)").

C. The Commission Should Not Adopt Bill-and-Keep for "VNXX" Provisioned FX Service Solely as a Matter of Policy.

11. Staff requests that the Commission modify the Initial Order to eliminate all discussion of the costs incurred to originate and terminate "VNXX" provisioned FX service and the observation that "there is no evidence about how much local exchange service customers may be contributing, through local rates, to support dial-up ISP service."[16] Rather, Staff seeks a Commission order imposing bill-and-keep not as a rate for intercarrier compensation but because "as articulated by the FCC, . . . where ISP-bound traffic is concerned (with its one-directional nature and long hold times) the incentives in the competitive marketplace will be distorted as long as carriers are able to recover their costs from each other rather than from their customers."[17] Pac-West continues to maintain that compensation issues are not properly before the Commission in this proceeding, but even if the Commission determines to the contrary, Staff's request lacks any semblance of support.

12. Most critically, Staff fails to cite any statute or Commission rule that authorizes the Commission to deny compensation to carriers who provide service to other carriers and their customers. Nor does Staff point to any other telecommunications service for which the Commission has concluded that the provider is not entitled to intercarrier compensation because it would distort the competitive marketplace. No such statutes, rules, or Commission decisions exist. Staff thus has no legal basis for its requested modification to the Initial Order.

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[16] Staff Answer ¶ 34.

[17] *Id.*

13. Staff nevertheless purports to rely on the FCC's *ISP Remand Order* to support its proposal. Such reliance is misplaced. While the D.C. Circuit did not vacate that order, the court found that the FCC failed to identify any plausible legal basis for its decision[18] – and the FCC has yet to even attempt to remedy that deficiency in the more than five years since the court issued its decision. Staff thus cannot rely on the *ISP Remand Order* as legal authority for its proposal to deny compensation for terminating traffic to "VNXX" provisioned FX service customers without consideration of the cost implications.

14. The FCC, moreover, has never required carriers to terminate ISP-bound traffic without compensation as a response to alleged "arbitrage opportunity" concerns. Rather, the FCC required a gradual reduction in the level of compensation for ISP-bound traffic termination to the current $0.0007 per minute.[19] Staff proposes far more draconian action, requiring an immediate end to all compensation based solely on the FCC's "arbitrage" concerns without any evidence whatsoever that "VNXX" provisioned FX service provided to ISPs creates any such concerns, much less greater concerns than those the FCC expressed in 2001 when dial-up access to ISPs was at its height.[20] Indeed, Staff ignores the FCC's finding in granting Core Communications' first petition for

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[18] *WorldCom, Inc. v. FCC*, 288 F.3d 429, 433-34 (D.C. Cir. 2002).

[19] Staff erroneously contends that "the FCC set out to eliminate reciprocal compensation in ISP-bound traffic by gradually reducing it to zero." Staff Answer ¶ 33. The FCC adopted no such requirement. To the contrary, the FCC expressly stated that "we do not reach any firm conclusion about bill and keep as a permanent mechanism for this or any other traffic." *ISP Remand Order* ¶ 74. The FCC's discussion of bill and keep in the ISP Remand Order, moreover, was much broader than its applicability to ISP-bound traffic, encompassing the FCC's suggestion that "any compensation regime based on carrier-to-carrier payments may create similar market distortions" and "initiat[ing] an inquiry as to whether bill and keep is a more economically efficient compensation scheme that the existing carrier-to-carrier payment mechanisms" for *all* telecommunications traffic. *Id.* ¶ 6.

[20] Any such concerns, moreover, have no applicability to "VNXX" provisioned FX service provided to non-ISP customers, yet Staff's proposed revisions to the Initial Order would use the same justification to preclude intercarrier compensation for all "VNXX" calling.

forbearance of the growth and new market caps in the *ISP Remand Order* that the FCC's "arbitrage concerns have decreased, and that these concerns are now outweighed by the public interest in creating a uniform compensation regime."[21]

15. Staff also completely disregards the FCC's finding that the Commission action Staff recommends would be unduly harmful to CLECs and their ISP customers:

> At the same time, **we believe it prudent to avoid a "flash cut" to a new compensation regime that would upset the legitimate business expectations of carriers and their customers.** Subsequent to the [FCC's] *Declaratory Ruling*, many states have required the payment of reciprocal compensation for ISP-bound traffic, and CLECs may have entered into contracts with vendors or with their ISP customers that reflect the expectation that the CLECs would continue to receive reciprocal compensation revenue. We believe it appropriate, in tailoring an interim compensation mechanism, to take these expectations into account while simultaneously establishing rates that will produce more accurate price signals and substantially reduce current market distortions.[22]

Staff thus selectively relies on the alleged "arbitrage opportunity" concerns stated in the *ISP Remand Order* without recognizing, much less accommodating, the FCC's corresponding concerns that immediately ending intercarrier compensation would create unpalatable consequences to the legitimate business expectations of both CLECs and their customers.

16. The very findings Staff asks the Commission to remove, moreover, undermine Staff's proposed rationale for precluding compensation for terminating "VNXX" provisioned FX service traffic. The Initial Order correctly found that Qwest produced no evidence that the rates its local exchange service customers pay do not cover amounts

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[21] *Petition of Core Communications, Inc., for Forbearance Under 47 U.S.C. 160(c) from Application of the ISP Remand Order*, FCC 04-241, WC Docket No. 03-171, Order ¶ 21 (rel. Oct. 18, 2004).

[22] *ISP Remand Order* ¶ 77.

Qwest must pay in intercarrier compensation for ISP-bound traffic, including "VNXX" provisioned FX service to ISPs. Far from demonstrating "arbitrage," this lack of evidence suggests that Qwest will receive a windfall if CLECs do not receive compensation for calls that Qwest customers make to ISPs who obtain "VNXX" provisioned FX service. The Commission should not eliminate recognition of this lack of evidence simply because it does not support Staff's policy position.

17. The Commission should refuse to remove findings that are inconsistent with Staff's proposed rationale for denying CLECs intercarrier compensation for terminating calls to their "VNXX" provisioned FX service customers, and the Commission should deny Staff's proposal to modify the Initial Order to adopt bill-and-keep without legal or factual support. Rather, the Commission should adopt Pac-West's proposed revisions to the Initial Order.

III. REQUEST TO REPLY AND REPLY TO QWEST

A. Qwest Fundamentally Misconstrues Federal Law on the Relationship Between Sections 251(b)(5) and 251(g) of the Act.

18. Pac-West has consistently and repeatedly explained that Section 251(b)(5) of the Act governs intercarrier compensation for the exchange of telecommunications traffic unless the traffic comes within one of the exceptions in Section 251(g), and because locally dialed ISP-bound traffic does not predate the Act and is not carried by an interexchange carrier ("IXC"), the reciprocal compensation obligations in Section 251(b)(5) apply to "VNXX" provisioned FX traffic.[23] Qwest largely ignored this legal issue until Qwest filed its Response to the petitions for administrative review. In

[23] Ex. 501T (Pac-West Sumpter Response) at 12-17; Joint CLEC Opening Brief ¶¶ 17-21; Joint CLEC Reply Brief ¶ 12; Pac-West Petition for Administrative Review ¶¶ 11-18.

that Response, Qwest for the first time raises several arguments that Pac-West could not reasonably have anticipated at this late stage of the proceeding and to which a reply is necessary to clarify Qwest's misinterpretation and mischaracterization of federal law and Pac-West's position.

19. First, Qwest surprisingly claims that the Commission is bound by the holding in the FCC's *ISP Remand Order* "that ISP traffic is 'information access,' a category of traffic specifically included in Section 251(g)."[24] The DC Circuit reversed that holding and unequivocally "found that 251(g) does not provide a basis for the [FCC's] action" because "there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic" and Section "251(g) speaks only of services provided 'to interexchange carriers and information service providers'; LECs' services to other LECs, even if an route to an ISP, are not 'to' either an IXC or an ISP."[25]

20. Qwest, however, contends, "Since no portion of the *ISP Remand Order* was vacated, it follows that, until the FCC says otherwise, ISP traffic is 'information access' that falls within the terms of Section 251(g)."[26] Thus, according to Qwest, the Commission must follow the FCC's legal interpretation even though the reviewing federal court held that interpretation was incorrect. No court has adopted such an Alice in Wonderland approach to the DC Circuit's decision, and neither should the Commission. While the *requirements* of the *ISP Remand Order* remain in effect in the wake of the D.C. Circuit's decision, the FCC's *rationale* in adopting those requirements are not and cannot be binding consistent with the court's decision.

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[24] Qwest Response ¶ 23 (footnote omitted).

[25] *WorldCom, Inc. v. FCC*, 288 F.3d 429, 433-34 (D.C. Cir. 2002).

[26] Qwest Response ¶ 25.

21. Second, Qwest mischaracterizes Pac-West's arguments as being "built on the false premise that the term 'ISP-bound traffic' in the *ISP Remand Order* refers to *all* ISP traffic."[27] Pac-West has never taken that position, as even the Washington District Court observed.[28] Rather, Pac-West has consistently maintained that the compensation required by the *ISP Remand Order* applies to all *locally dialed* ISP-bound traffic, just as reciprocal compensation applies to all *locally dialed* voice traffic. Pac-West compensates Qwest for calls that Pac-West's customers make to subscribers of Qwest FX, MEL, and VoIP termination services when the telephone number of the Pac-West customer is rated to the same local calling area as the telephone number of the Qwest subscriber, regardless of the physical location of the calling and called parties. Pac-West seeks, and has only ever sought, intercarrier compensation on the same basis that it applies to Qwest and all other LECs.[29]

22. Third, Qwest remarkably maintains that "the Commission lacks the authority to require Qwest to pay terminating compensation (either at the voice rate or at the $.0007

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[27] Qwest Response ¶ 27 (emphasis in original). Paradoxically, Qwest premises at least its first argument – that the FCC's rationale in the *ISP Remand Order* that ISP-bound traffic is governed by Section 251(g) remains binding – on the very contention Qwest (incorrectly) criticizes Pac-West for making.

[28] *Qwest v. WUTC*, 484 F. Supp. 2d 1160, 1176 (W.D. Wa. 2007) ("Ironically, the WUTC interpreted the *ISP Remand Order* so broadly that it actually *rejected* Pac-West's argument that the order requires ISP compensation to be paid only on traffic from telephone numbers assigned to the same local calling area.") (emphasis in original).

[29] Pac-West thus does not claim, as Qwest alleges, that Qwest's FX, MEL, and One Flex service are unlawful. Qwest Answer ¶¶ 95-100. To the contrary, Pac-West contends that it is entitled to intercarrier compensation for calls from Qwest customers that Pac-West terminates to its "VNXX" provisioned FX service on the same basis that Qwest is entitled to intercarrier compensation for calls Pac-West customers make to subscribers of Qwest FX and FX-like services. Only if the Commission were to determine that Pac-West is *not* entitled to such compensation should the Commission similarly find that Qwest is not entitled to intercarrier compensation for calls terminated to customers of its comparable FX and FX-like services.

rate for local ISP traffic) on interexchange ISP traffic."[30] The Ninth Circuit held directly to the contrary in *Peevey*,[31] a case Qwest cites in the same paragraph of its Response. The court in that case upheld the California Commission's requirement to pay CLECs intercarrier compensation for terminating "VNXX" provisioned FX service based on that commission's "*own* balancing test in determining as a matter of fair compensation policy that VNXX traffic is subject to reciprocal compensation as 'local' traffic; it did not make that determination under the *Telecommunications Act* or the *FCC's* rules for reciprocal compensation. Rather, the CPUC determined that VNXX traffic is interexchange traffic that is *not* subject to the FCC's reciprocal compensation rules."[32] Thus even if the Commission were to conclude that "VNXX" provisioned FX service is "interexchange" – which the Commission should not – the Commission has (and should exercise) the authority to require Qwest to pay terminating compensation for such traffic consistent with federal law.

23. Finally, Qwest misconstrues the FCC's July 2007 decision in the second forbearance petition filed by Core Communications ("*Core II*").[33] Core petitioned the FCC to forbear from enforcing Section 251(g) under the belief that such forbearance would mean that traffic subject to access charges under that section would then be governed by the reciprocal compensation requirements of Section 251(b)(5). The FCC

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[30] Qwest Response ¶ 27.

[31] *Verizon California, Inc. v. Peevey*, 462 F.3d 1142 (9th Cir. 2006).

[32] *Id.* at 1158 (all emphasis in original).

[33] *In re Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Act and Implementing Rules*, Memorandum Opinion and Order, 22 FCC Rcd. 14118, 2007 WL 2159638 (2007).

denied Core's petition, finding that such forbearance would not result in the relief Core sought:

> Because section 251(g) explicitly contemplates affirmative [FCC] action in the form of new regulation, we find that forbearance from section 251(g) would not give Core the relief it seeks, because the section 251(b)(5) reciprocal compensation regime would not automatically, and by default, govern traffic that was previously subject to section 251(g). If the [FCC] were to forbear from the rate regulation preserved by section 251(g), there would be no rate regulation governing the exchange of traffic currently subject to the access charge regime.[34]

With this decision, according to Qwest, "the FCC has made it clear beyond reasonable dispute that the CLEC-created default relationship between sections 251(b)(5) and 251(g) is wishful thinking and not the law."[35] Qwest, not Pac-West, is engaged in wishful thinking.

24. The FCC, not just the CLECs, has recognized the relationship between Sections 251(b)(5) and 251(g) – including in its *Core II* decision:

> The [FCC] . . . characterized section 251(g) as a "carve-out provision" that "is properly viewed as a limitation on the scope of section 251(b)(5) [of the Act]." It found that Congress "did not intend to interfere" with the [FCC's] pre-1996 Act authority with respect to the access charge regime and that Congress "exempted the services enumerated in section 251(g) from the newly imposed reciprocal compensation requirement in order to ensure that section 251(b)(5) is not interpreted to override either existing or future regulations prescribed by the [FCC]."[36]

That is precisely Pac-West's argument. As the FCC states, Section 251(b)(5) governs intercarrier compensation for the exchange of telecommunications traffic unless that traffic is exempted from reciprocal compensation under Section 251(g).

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[34] *Id.* ¶ 14 (footnote omitted).

[35] Qwest Response ¶ 30.

[36] *Core II* ¶ 3 (quoting *ISP Remand Order* ¶¶ 35 & 36) (footnotes omitted).

25. The FCC did not alter this interpretation in *Core II*. Rather, the FCC found that the traffic carved out of Section 251(b)(5) by Section 251(g) remains carved out, even if the pre-Act compensation mechanisms applicable to that traffic were no longer to apply. The FCC interpreted the statutory language as providing that traffic identified in Section 251(g) is not subject to the reciprocal compensation requirements in Section 251(b)(5), regardless of whether or not the FCC enforces the specified pre-Act compensation obligations and restrictions. This conclusion is completely consistent with the FCC's and Pac-West's interpretation of the relationship between Section 251(b)(5) and Section 251(g). Qwest's contention to the contrary misconstrues federal law in general, and the FCC's *Core II* decision in particular.

26. Pac-West requests that the Commission consider Pac-West's reply to these new arguments raised by Qwest in its Response.

B. The Disposition of This Case Will Not Resolve All Issues on Remand in Pac-West's Petition to Enforce Its Interconnection Agreement.

27. In the course of responding to Broadwing's Petition for Administrative Review of the Initial Order's disposition of Broadwing's counterclaims, Qwest states, "The *Initial Order* renders a proper decision of what the *ISP Remand Order* has always meant, not some new retroactive interpretation. In light of that interpretation, the *Initial Order* adjudicates the parties' rights under state law and the ICA."[37] Pac-West takes no position on the disposition of Broadwing's counterclaims, but strenuously objects to any suggestion that the Initial Order or the Commission's final order in this proceeding resolves all issues in the remand of Pac-West's petition for enforcement of its interconnection agreement ("ICA") in Docket No. UT-053036.

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[37] Qwest Response ¶ 108.

28. Even if the Commission determines in this case whether "VNXX" provisioned FX traffic is within or outside the local calling area as required by the District Court, issues specific to Pac-West remain to be resolved. These issues include, but are not necessarily limited to the retroactive applicability to Pac-West of any compensation mechanism adopted in this docket, the calculation of any such compensation, and the existence and amount of "VNXX" traffic Pac-West has terminated. Those issues are not before the Commission in this docket. Indeed, Pac-West's ICA was never at issue in this proceeding, nor was Pac-West's enforcement action ever consolidated with this proceeding.

29. The Commission, therefore, should limit its final order to resolution of the issues presented in this proceeding and should leave open issues specific to Pac-West and its ICA with Qwest for resolution in the proceedings on remand in Docket No. UT-053036.

IV. CONCLUSION

30. For the foregoing reasons and the reasons stated in Pac-West's Petition, the Commission should deny Staff's challenges to the Initial Order and should grant Pac-West's Petition for Administrative Review.

DATED this 30th day of November, 2007.

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