



BEFORE THE ARIZONA CORPORATION COMMISSION

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JEFF HATCH-MILLER
Chairman
MARC SPITZER
Commissioner
WILLIAM MUNDELL
Commissioner
MIKE GLEASON
Commissioner
KRISTIN MAYES
Commissioner

LEVEL 3 COMMUNICATIONS, LLC,
Complainant

vs.

QWEST CORPORATION,
Respondent

DOCKET NO. T-01051B-05-0415
T-03654A-05-0415

QWEST OPENING BRIEF

AZ CORP COMMISSION
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2005 NOV 30 P 1:58

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1 Qwest Corporation (“Qwest”) hereby files its opening brief. Qwest requests that the
2 Administrative Law Judge (“ALJ”) issue a ruling that recommends the Arizona Corporation
3 Commission (“Commission”) deny the relief requested by Level 3 Communications, LLC
4 (“Level 3”), declare Level 3’s bills to Qwest invalid, and order Level 3 to cease using virtual
5 NXX (“VNXX”) numbers. Alternatively, if the ALJ concludes that VNXX numbers are
6 permissible, the ALJ should find that no terminating intercarrier compensation is due for calls to
7 those numbers.

8 I. INTRODUCTION

9
10 Level 3’s fundamental argument is that in the *ISP Remand Order*,¹ the FCC preemptively
11 required that terminating intercarrier compensation be paid on *all* Internet Service Provider
12 (“ISP”) traffic, including VNXX ISP traffic and that as a result of the *Core Forbearance Order*²
13 such compensation is no longer capped. Qwest argues that the *ISP Remand Order* and the *Core*
14 *Forbearance Order* addressed compensation only for ISP traffic where the ISP is physically
15 located in the same LCA as the customer placing the call, and did not address the treatment of
16 VNXX traffic.³

17
18 ¹ *In the Matter of Implementation of the Local Competition Provisions in the*
19 *Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCCR
20 9151 (2001) (“*ISP Remand Order*”).

21 ² *Petition of Core Communications for Forbearance Under 47 USC § 160(c) from the*
22 *Application of the ISP Remand Order*, Order FCC 04-241 WC Docket No. 03-171 (rel. October
23 18, 2004) (“*Core Forbearance Order*”).

24 ³ The FCC has repeatedly ruled that ISP traffic is interstate in nature because the ultimate
25 end points of the calls are at websites across the country or in many cases in other parts of the
26 world. Declaratory Ruling in CC Docket No. 96-98 and NPRM in CC Docket No. 99-68, *In the*
Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of
1996 and Intercarrier Compensation for ISP-Bound Traffic, 14 FCC Rcd 3689, ¶¶ 1, 10-20
(1999) (“*ISP Declaratory Order*”); *ISP Remand Order*, ¶¶ 14, 58-62. Nonetheless, for
intercarrier compensation purposes, the relevant end points are the physical location of the
calling party and the physical location of the ISP’s modem banks and servers. For dial-up
Internet service, an ISP provides end user customers with local access numbers (which they
obtain from telecommunications carriers who have the authority to obtain telephone numbers

1 This case presents several intertwined issues. First, there is the general issue of VNXX
2 traffic and the extent to which the use of VNXX numbering schemes is permissible. Second,
3 there is the issue of whether intercarrier compensation is due for this type of non-local ISP
4 traffic. Finally, there is the question of whether Level 3 may use local interconnection facilities
5 to route VNXX traffic over Qwest's network to its own point of interconnection with Qwest.

6 VNXX numbers are telephone numbers that have the same NXX (prefix) as the local
7 calling area ("LCA")⁴ of an ISP's end-user customers though the holder of the number is actually
8 situated outside the LCA. The term "virtual" ("V") is used to describe the fact that calls to the
9 VNXX number are not local calls, even though the dialing pattern makes them appear to be
10 local. This is because each VNXX number is associated with a routing number that will route
11 the seemingly local calls to the often distant location of the CLEC serving the ISP and then from
12 the CLEC to the ISP's modems, servers, and routers (which are also often located in distant
13 locations from the LCA from which the call originates). This allows the CLEC and the ISP to
14 force Qwest to transport non-local calls from multiple LCAs to a single distant physical location.

15 Level 3 seeks intercarrier compensation from Qwest for calls originated by Internet end-
16 users (consumers) who obtain dial-up Internet access by calling ISPs that are customers of Level
17 3. These ISP customers of Level 3 receive VNXX numbers (from Level 3) in order to make
18 these calls look (to consumers) like local calls. In fact, as previously indicated, they are not local

19
20 from NANPA) that the customer's computer calls. Such calls are answered by modems provided
21 by the ISP that convert the analog signals from the end user's computer into Internet Protocol
22 (IP) before sending the communication into the Internet. Through the use of modems, servers,
23 and routers, the ISP gives the customer access to the Internet, including the ability to browse the
24 Web, engage in transactions, and access other Internet functionalities and services. In addition to
25 this basic Internet functionality, ISPs may also provide other services, such as email and web
26 hosting.

4 As used herein, a local calling area ("LCA") is a geographical area approved by the
Commission in which calls originating within the LCA and terminating to other customers
within the LCA are deemed to be local calls and within which LCA local service is provided on a
flat-rated basis. An EAS area is a synonym for a LCA, as used herein.

1 Internet usage and the subsequent increase in telecommunications traffic
2 directed to Internet Service Providers ('ISPs') like America OnLine and
3 EarthLink. Not long after Congress adopted the Act, newly formed
4 CLECs began targeting ISPs to benefit from the reciprocal compensation
5 provisions in interconnection agreements and the compensation they
6 would receive from the one-way traffic that flows into ISP customers but
7 does not flow in the opposite direction.⁵

8 That is an accurate description of Level 3's method of operation. Through the facilities
9 provided by Qwest, in combination with NXXs that are assigned by the North American
10 Numbering Plan Administration ("NANPA"), Level 3 assigns telephone numbers from these
11 NXXs throughout Arizona. Level 3 assigns these numbers to its single point ISP customers. In
12 so doing, Level 3 ignores the geographically defined LCAs for which the NXXs were intended.
13 Due to Level 3's inappropriate number assignments the calls to these numbers do not terminate
14 in the LCA where the calls originate. Instead, at no additional charge to any of the customers
15 involved, the calls are carried by Qwest from points throughout Arizona to Level 3's location in
16 each LATA.⁶ These calls should be treated as what they truly are—toll calls.

17 The dispute in this case as framed by Level 3's Petition relates to whether intercarrier
18 compensation principles should apply to the ISP VNXX traffic. The threshold question,
19 however, is whether VNXX traffic should be permitted at all. To understand the issues
20 presented by VNXX, it is first necessary to understand (1) how the telephone numbering system
21 works; (2) what VNXX is and how it works; (3) the historical treatment of intercarrier
22 compensation; and (4) issues concerning intercarrier compensation for ISP-bound traffic. In
23 addition, because the parties to this case are both telecommunications companies and operate
24 under an interconnection agreement ("ICA"), it is necessary to have an understanding of whether
25 their ICA offers any guidance on these issues.

26 **A. LCAs vs. Long Distance**

⁵ *Pacific Bell v. Level 3 Telecom, Inc*, 325 F3d 1114, 1118-19 (9th Cir 2003).

⁶ Under the current law, a CLEC needs to have at least one point of interconnection ("POI") per local access and transportation area ("LATA").

1 Historically, the Arizona Commission has treated local calls (i.e., where the parties to the
2 call are located within the same LCA) differently from non-local calls (i.e., where the parties to
3 the call are not located within the same LCA. Consistent with that distinction, in Arizona,
4 pricing has always been different as well. Local calls have traditionally been flat-rated.
5 However, the non-local calls, which are also known as interexchange or long distance calls, have
6 historically been priced on a per minute of use basis.

7 Level 3's argument ignores a fundamental building block of telecommunications in
8 Arizona and in every other state—the concept of the LCA, and the fact that the states, not the
9 FCC, have jurisdiction over LCAs. The Arizona Commission has consistently taken an active
10 role in the definition of LCAs based primarily on the existence or non-existence of a community
11 of interest among the residents and businesses of specific geographical locations. A good
12 example of this was the Commission's decision in Qwest's (then U S WEST's) 1995 rate case,
13 where the Commission ordered broad expansion of Extended Area Service ("EAS") in many
14 areas.⁷ As part of that order, the Commission adopted as its criteria for expansions of EAS
15 "calling volumes, socio-economic linkages, *contiguity*, and public input to determine whether a
16 community of interest exists."⁸ Thus, over time, under the Commission's treatment and practice,
17 areas that may have been separate LCAs may be combined into a single LCA if the Commission
18 concludes that a community of interest exists. Upon such a finding, all calling within the
19 geographical area is re-classified as "local" and not as "long distance." Thus, geography
20 (contiguity) and the location of called and calling parties in relation to each other have been and
21 continue to be concepts inherent in the establishment of LCAs in Arizona.

22
23 ⁷ Opinion and Order, *In the Matter of the Application of U S WEST Communications, Inc.,*
24 *a Colorado Corporation, for a Hearing to Determine the Earnings of the Company, the Fair*
25 *Value of the Company for Ratemaking Purposes, to Fix a Just and Reasonable Rate of Return*
26 *Thereon and to Approve Rate Schedules Designed to Develop Such a Return*, Docket No. E-
1051-93-183, Decision no. 58927, at 111-115 (ACC January 3, 1995).

⁸ *Id.* at 115 (emphasis added).

1 **B. Intercarrier Compensation/Numbering**

2

3 There are two general traffic types to which intercarrier compensation applies.
4 Interexchange (toll or long distance) traffic is compensated according to switched access service
5 tariffs. Local traffic is generally compensated according to ICAs prescribing either “bill and
6 keep” or “reciprocal compensation” arrangements.

7 Whether a call is local or long distance is determined by the geographic location of the
8 end points of the call. Based on these physical end points, the telecommunications industry has
9 developed a method of determining the location (*i.e.*, the LCA) for intercarrier compensation
10 purposes using the telephone numbers of the originating and terminating end user customers.
11 Telephone numbers are displayed in the NPA/NXX format (in which the NPA is the area code
12 and the NXX is the central office code). These three digits (NXX) are assigned to and indicate a
13 specific central office from which a particular customer is physically served. In other words, in
14 the number (602) 630-XXXX, the “630” prefix is assigned to a specific rate center in the (602)
15 area code, and individual telephone numbers are assigned to end users in the geographic area that
16 makes up the LCA. Thus, the telephone number identifies the geographic area where the
17 customer is located. The individual telephone number is assigned based on the geographic LCA;
18 the LCA is not defined based on the telephone number.

19 The central office code is followed by a four-digit number which together with the NXX
20 constitutes the telephone number of the end-user customer’s telephone line. Based on this
21 format and the known geographic LCA/EAS boundaries, a call is determined to be either local or
22 long distance. The numbering guidelines are quite clear in terms of requiring a synchronization
23 between the numbers assigned and the geographic territory associated with those numbers. To
24 freely disregard this expected synchronization would completely gut the current system, which
25 distinguishes between local and long distance calling based on customer location.

26 Local traffic is telecommunications traffic that originates and terminates within a

1 geographically-defined area. These areas are called LCAs or extended area service (“EAS”)
2 areas.⁹ These geographically-defined areas allow an end-user customer to have unlimited calling
3 within these areas for a flat rate. Qwest’s LCAs are defined by its exchange boundary maps and
4 contained in its tariffs and price lists on file with the Commission.

5 The Telecommunications Act of 1996 (“Act”) mandated some form of intercarrier
6 compensation for the exchange of local traffic between carriers. 47 U.S.C. §251(b)(5). The FCC
7 promulgated rules and state commissions arbitrated issues around the mandate for intercarrier
8 compensation for the exchange of this local traffic. Reciprocal compensation for local traffic
9 provides both incumbent local exchange carriers (“ILECs”) and competitive local exchange
10 carriers (“CLECs”) the opportunity to recover the costs associated with interconnection for the
11 exchange of local traffic. Reciprocal compensation requires that the carrier whose retail
12 customer originates a local call must pay the terminating carrier. “Bill and keep” is a form of
13 reciprocal compensation that allows each carrier to bill their end-user customer and keep the
14 revenue but not to bill each other for terminating traffic that originates on the other carrier’s
15 network, reducing the need to create a record of and bill for local traffic.

16 Local traffic bound for the Internet (ISP-bound traffic) is not subject to reciprocal
17 compensation under 47 U.S.C. §251(b)(5), but is subject to a different intercarrier compensation
18 mechanism, under section 251(g), as set forth in the FCC’s *ISP Remand Order*. Details of this
19 order are discussed below.

20 Interexchange (long distance, or toll) traffic is traffic that originates and terminates
21 between exchanges located in *different LCAs*. Toll traffic is measured in minutes of use and is
22 charged to the end user customer by the end user customer’s selected interexchange carrier
23 (“IXC”). The IXC must pay originating access charges to the originating LEC for the use of its
24

25 ⁹ This description of “local traffic” is consistent with the definitions of relevant related
26 terms contained in the Arizona statutes, Commission rules, and Qwest’s tariffs. (See, Section III.
B. page 19, *infra*.)

1 network to start the call, and terminating access charges to the terminating LEC for the use of its
2 network to complete the call. Section 251(g) of the Act preserves this regime.

3
4 **C. VNXX Service**

5
6 Virtual NXX or VNXX refers to a situation where a CLEC, such as Level 3, has obtained
7 an assigned block of local telephone numbers for a LCA, but the CLEC uses its numbers for its
8 ISP customers who have no physical presence in the LCAs associated with those telephone
9 numbers.¹⁰ The traffic directed to those numbers is routed to one of the CLEC's points of
10 interconnection with Qwest and is then delivered to the CLEC's ISP customer (at the ISP's
11 "server" or, more accurately, its "modem bank") at a physical location in another LCA (or even
12 in another state).

13 VNXX undercuts the principle of geographic synchronization between telephone
14 numbers and customer location because it results in a situation where there is a carrier-assigned
15 NXX associated with a particular central office, but where the carrier has assigned numbers from
16 that NXX to customers physically located outside of the LCA.

17 With VNXX, the physical location of the CLEC's customer is in a LCA that would
18 require a toll call from the LCA with which the telephone number is associated. This scheme
19 requires the assignment of a "virtual" NXX. The NXX is labeled "virtual," because it appears as
20 though the called party is located in the calling party's LCA. In reality, a call to the "virtual"
21 NXX does not result in a local call within the LCA in which the caller is located. The call is
22 terminated in a different LCA, and perhaps even in a different state. Exhibit A, attached hereto,

23
24 ¹⁰ Although VNXX issues often arise in the context of ISP traffic, the concept is not solely
25 related to ISP traffic alone. A VNXX arrangement also can exist for voice traffic (such as an
26 inbound call center, a voice messaging system or a reservation center). However, reciprocal
compensation principles only apply when these calls are routed to a CLEC retail customer who is
located in the same LCA where the call originated.

1 illustrates how VNXX circumvents the proper numbering plan.

2
3 **D. ISP Traffic**

4
5 ISP traffic is traffic sent to an ISP over a dial-up connection. If the caller and the ISP are
6 in the same LCA, then the intercarrier compensation provisions of the FCC's *ISP Remand Order*
7 apply. That Order currently establishes a default compensation rate of \$0.0007 per minute for
8 ISP-bound traffic (defined to be traffic that originates and terminates in the same LCA), payable
9 to the carrier who terminates the call unless the carriers are operating under a bill and keep
10 arrangement.

11 Prior to the use of VNXX codes, the ISP had a modem bank or server located in the same
12 LCA as its customers. The ISP would obtain local numbers, and the customers seeking access to
13 the Internet would dial a local call – one that originated at the customer's home and terminated,
14 for purposes of intercarrier compensation, at the ISP's local server.

15 However, all ISP traffic is not necessarily local traffic because it may require transport
16 outside of a LCA to get to the Internet access point. For example, an ISP may offer its
17 subscribers an 8XX number for dial up access, or a subscriber may dial a toll number to obtain
18 such access. In the first case, the ISP would, in setting up an 8XX number, pay toll charges for
19 the traffic that it draws from distant calling areas. Further, the IXC providing the 8XX service
20 would pay access charges to the originating carrier. In the second case, the customers would
21 generally pay on a per-minute basis for the long distance call. In the case of a long distance call,
22 access charges would be due to the originating and terminating LECs from the IXC who carried
23 the call.

24
25 **III. ARGUMENT**

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Level 3’s claims are without merit. Level 3’s interpretation of the *ISP Remand Order* is demonstrably incorrect. The *ISP Remand Order* applies only to ISP traffic that originates and is delivered to an ISP in the same LCA—it does not apply to VNXX ISP traffic. VNXX is inconsistent with Arizona statutes, Commission rules, Commission decisions, and Qwest tariffs. VNXX is an arrangement that disregards the well established concept of local calling areas and provides the functionality of toll or 8XX at no extra charge to either party to the call, and shifts the cost to the ILEC (Qwest) for transporting this “disguised” toll call. VNXX is not one of the types of traffic covered by the parties’ interconnection agreement.

VNXX has become an issue because CLECs, like Level 3 in Arizona, obtain local numbers that are actually assigned to its ISP customers with no physical presence in the LCA from which the numbers were allocated. Thus, the traffic directed to those numbers is, instead of being routed to a customer in the same LCA as the calling party, routed to a central point of interconnection of the CLEC and is then delivered to the CLEC’s ISP customer at a physical location in another LCA or even in another state.

These calls are non-local calls, really nothing more than toll calls, and they are not compensable as “ISP-bound traffic,” as the terminating intercarrier compensation mechanism in place for ISP-bound traffic is limited to local ISP traffic. No reciprocal compensation is due to the CLEC for terminating these calls. VNXX violates sound public policy. The Commission has the authority to ban the use of VNXX in Arizona and should do so.

A. Level 3’s Interpretation of the *ISP Remand Order* is Demonstrably Incorrect. The *ISP Remand Order* Applies Only to ISP Traffic that is Local in Nature (That Originates and Terminates in the Same LCA).

It is important to place the *ISP Remand Order* in its proper context. Thus, Qwest will

1 briefly address four critical decisions: the FCC's *ISP Declaratory Order* and *ISP Remand*
2 *Order*, and two decisions of the Court of Appeals for the D.C. Circuit, in particular *WorldCom,*
3 *Inc. v. FCC.* ("WorldCom")¹¹

4
5 **1. The *ISP Remand Order*, the *WorldCom* Decision, and Other Relevant**
6 **Authority Demonstrate That Level 3's Interpretation is Invalid.**

7
8 Administrative orders such as the *ISP Remand Order*, like statutes, should be interpreted
9 by reading them in a consistent manner, giving meaning to all parts thereof, and reading them in
10 the context in which they were decided by the agency. A corollary principle is that an
11 administrative order should not be read so as to ignore or obviate substantive portions of the
12 order. The clear statements of the FCC and the Circuit Court identifying the breadth of the issue
13 decided in the *ISP Remand Order* demonstrate that it applies only to local ISP traffic (which the
14 FCC, in the *ISP Remand Order*, refers to by the phrase "ISP-bound traffic"). Any other reading
15 of the order violates these interpretive principles. Furthermore, courts and state commissions are
16 bound by the federal Hobbs Act to follow the rulings of the federal appellate court reviewing
17 FCC decisions. Here, the reviewing court concluded that the *only* issue decided in the *ISP*
18 *Remand Order* is the proper compensation regime to be applied to *local* ISP traffic.

19 The starting point for analysis is the FCC's 1996 *Local Competition Order* (also often
20 referred to as the *First Report and Order*), in which the FCC concluded that reciprocal
21 compensation under section 251(b)(5) applies only to "traffic that originates and terminates
22 within a local calling area as defined by the state commissions."¹² Thus, from the inception of
23 the Act, the FCC defined the reciprocal compensation obligation in terms of local calls. This, of

24
25 ¹¹ 288 F.3d 429 (D.C. Cir. 2002).

26 ¹² First Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499 ¶ 1034 (1996) ("1996 Local Competition Order") (emphasis added); see also *ISP Remand Order* ¶ 12.

1 course, was entirely rational because other compensation mechanisms had long been in place for
2 interexchange calls (*i.e.*, the intrastate and interstate access charge regimes). Since 1984, state
3 commissions (for intrastate interexchange calls) and the FCC (for interstate interexchange calls)
4 have implemented and continue to follow tariffs that govern the appropriate compensation for
5 interexchange traffic. Those tariffs remain effective because, under section 251(g), the Act
6 explicitly preserved pre-existing non-local compensation mechanisms.

7 Within two years of the Act's passage, the FCC had received many requests to clarify
8 whether "local" traffic bound for ISPs, given its unique one-way nature (where all the traffic
9 flows to the CLEC that serves ISP customers and the hold times were significantly longer than
10 for voice calls), should be subject to reciprocal compensation under section 251(b)(5). As a
11 consequence, the FCC opened a docket (CC Docket No. 99-68) to address this question, which it
12 combined with its original docket to implement the local competition provisions of the 1996 Act
13 (CC Docket No. 96-98). In February 1999, the FCC entered its *ISP Declaratory Order*, wherein
14 the FCC concluded that ISP traffic is interstate in nature, based on the fact that the ultimate
15 destinations of ISP calls are websites scattered across the country and the world. It is critical to
16 understand the situation, as described in the order that faced the FCC:

17 ISPs purchase analog and digital lines from local exchange customers to connect
18 to their dial-in subscribers. Under one typical arrangement, *an ISP customer dials*
19 *a seven-digit number to reach the ISP server in the same local calling area.* The
20 ISP, in turn, combines 'computer processing, information storage, protocol
21 conversion, and routing with transmission to enable users to access Internet
22 content and services.' (*ISP Declaratory Order* ¶ 4; emphasis added).

23 The focus of the FCC was thus entirely on local ISP calls.

24 In *Bell Atlantic Telephone Cos. v. FCC*,¹³ the D.C. Circuit vacated and remanded the *ISP*
25 *Declaratory Order* on the ground that the FCC had failed to adequately explain why the end-to-
26 end jurisdictional analysis was relevant to deciding if ISP calls fit into the local/long distance

13 206 F.3d 1, 5 and 8 (D.C. Cir. 2000).

1 model. (206 F.3d at 1, 5, and 8). The court could hardly have been more clear in describing the
2 issue the FCC had addressed: “In the [*ISP Declaratory Order*], [the FCC] considered whether
3 calls to internet service providers (“ISPs”) *within the caller’s local calling area are themselves*
4 *‘local.’*”¹⁴ There is nothing to suggest in *Bell Atlantic* that either the FCC or the court was
5 addressing anything other than the proper treatment of *local* ISP traffic.

6 On remand, the FCC considered the proper treatment of ISP traffic in light of the *Bell*
7 *Atlantic* decision. Instead of relying again on the end-to-end analysis, the FCC held that section
8 251(g) allowed it to carve out the ISP traffic under consideration from the provisions of section
9 251(b)(5). (*ISP Remand Order* ¶¶ 42-47). The FCC held that the traffic in question “*at a*
10 *minimum*, falls under the rubric of ‘information access,’ a legacy term imported in the 1996 Act
11 from the MFJ” (*Id.* ¶ 42). On the basis of this analysis, the FCC concluded that the traffic
12 does not fall under section 251(b)(5); therefore, the FCC determined that it could define a
13 separate compensation regime for such traffic. The FCC then defined the interim compensation
14 regime applicable to the traffic in question, which it stated applied to “ISP-bound traffic.” (*e.g.*,
15 *Id.* ¶ 7). The critical issue, then, is what traffic the FCC intended to include within “ISP-bound
16 traffic” for purposes of the interim compensation regime: Was it local ISP traffic or all ISP
17 traffic?

18 The first place to look is the *ISP Remand Order* itself. The context of the order makes it
19 clear that the only traffic being considered was ISP traffic that originates and terminates in the
20 same local calling area – in other words, local ISP traffic (or, to use the FCC’s nomenclature,
21 “ISP-bound traffic”). For example, the FCC commences its background discussion by reiterating
22 its statement from the *ISP Declaratory Order* that:

23 an ISP’s end-user customers typically access the Internet through an ISP server
24 *located in the same local calling area*. Customers generally pay their LEC a flat
25 monthly fee *for the use of the local exchange network*, including connections to
their local ISP. They also generally pay their ISP a flat monthly fee for access to
the Internet. ISPs then combine ‘computer processing, information storage,

26 ¹⁴ *Id.* at 2; (emphasis added).

1 protocol conversion, and routing with transmission to enable users to access
2 Internet content and services.” (*Id.* ¶ 10, footnotes omitted; all footnotes cite to
ISP Declaratory Order; emphasis added).

3 In the next paragraph, the FCC’s focus remains on ISP connections to LCAs. The FCC notes
4 that ISPs qualify for the Enhanced Services Provider (“ESP”) exemption, which allows them to
5 be “treated as end-users for the purposes of applying access charges and are, therefore, entitled to
6 pay local business rates for *their connection to LEC central offices* and the public switched
7 telephone network (PSTN).” (*Id.* ¶ 11; emphasis added). The importance of this language cannot
8 be overstated because, once again, it demonstrates that the FCC’s attention was fixed solely on
9 local ISP traffic. In the next paragraph, the FCC retains its focus on “*local competition*,” and the
10 role that reciprocal compensation plays in its development. (*Id.* ¶ 12).

11 Having articulated the foregoing as background, the FCC then identified its reason for
12 opening the ISP traffic docket: “[T]he question arose whether reciprocal compensation
13 obligations apply to the delivery of calls *from one LEC’s end-user customer to an ISP in the*
14 *same local calling area that is served by the competing LEC.*” (*Id.* ¶13). Thus, nothing in the
15 FCC’s analysis of the nature of the traffic or its implementation of the interim regime suggests
16 that the FCC had broadened the scope of its inquiry in the *ISP Remand Order*. The FCC’s
17 silence on the subject is noteworthy.

18 For purposes of the issue before the Commission, the most critical statement on the
19 question of the breadth of the *ISP Remand Order* comes in the D.C. Circuit’s review of the *ISP*
20 *Remand Order* in the *WorldCom* decision. There, the D.C. Circuit was clear in its
21 characterization of the issue that was addressed in the *ISP Remand Order*: “In the order before
22 us the [FCC] held that under § 251(g) of the Act it was authorized to ‘carve out’ from §
23 251(b)(5) calls made to internet service providers (“ISPs”) *located within the caller’s local*
24 *calling area.*”¹⁵ This is not a casual background statement; instead, this plain and unequivocal
25 language is the reviewing court’s express statement that the *holding* of the *ISP Remand Order*

26 ¹⁵ 288 F.3d at 430 (emphasis added).

1 relates *solely* to local ISP traffic.

2 The *WorldCom* court found that section 251(g) did not provide the FCC with a basis for
3 its action, but, at the same time, the court made it clear that it was not deciding other issues that
4 may be determinative and that would justify the FCC's decision, including (1) whether ISP calls
5 are "telephone exchange service" or "exchange access," or neither; (2) the scope of
6 "telecommunications" under section 251(b)(5); or (3) whether the FCC could adopt a bill and
7 keep regime.¹⁶ Furthermore, because there was a "non-trivial likelihood that the Commission
8 has authority to elect such a system,"¹⁷ the court remanded, *but did not vacate*, the *ISP Remand*
9 *Order*. Thus, properly interpreted in light of *WorldCom*, the *ISP Remand Order* is the applicable
10 law for the treatment of local ISP traffic.

11 Just as the *ISP Remand Order* remains in effect, the *WorldCom* court's characterization
12 of the FCC's holding (that it applies only to local ISP traffic) is binding on all other courts and
13 commissions because the *WorldCom* court is the Hobbs Act reviewing court for the *ISP Remand*
14 *Order*. Under the Hobbs Act, federal courts of appeal have "exclusive jurisdiction to enjoin, set
15 aside, suspend (in whole or in part), or determine the validity of (a) all final orders of the Federal
16 Communications Commission made reviewable by section 402(a) of title 47."¹⁸ Thus, the Hobbs
17 Act grants exclusive interpretive jurisdiction over appeals of FCC decisions to the federal
18 appellate courts and, absent reversal of an FCC determination by a federal appellate court,
19 federal district courts and state commissions are obligated to apply and abide by the appellate
20 court's interpretation of FCC rules and orders. Further, state commissions, under authority
21 delegated by the Act, must follow decisions of federal courts interpreting the Act and
22 interpreting FCC decisions that implement the Act.¹⁹

23 ¹⁶ *Id.* at 434.

24 ¹⁷ *Id.*

25 ¹⁸ 2 U.S.C. § 2342(1) (emphasis added). 47 U.S.C. § 402(b) sets forth a few specific
exceptions to 47 U.S.C. § 402(a), none of which applies here.

26 ¹⁹ See 47 U.S.C. § 408 (Orders of the FCC "shall continue in force for the period of time
specified in the order or until the Commission or a court of competent jurisdiction issues a

1
2 **2. Qwest’s Interpretation of the *ISP Remand Order* is Consistent with**
3 **Two Recent Oregon Decisions and with Other Authority.**
4

5 Qwest’s interpretation of the *ISP Remand Order* is directly supported by a recent
6 decision of an Oregon ALJ on the identical issue (“*Oregon ALJ Decision*”).²⁰ In that case, Level
7 3 argued that the statements from the *ISP Declaratory Order*, the *Bell Atlantic* decision, the *ISP*
8 *Remand Order*, and the *WorldCom* decision that interpreted the *ISP Remand Order* as relating to
9 only local *ISP* traffic, were mere “background statements.” The ALJ rejected that argument:

10 First, it presumes that both the FCC and the Court chose to describe *ISP*-bound
11 traffic in a particular manner without intending that it have any specific meaning.
12 Second, it ignores the fact that there are repeated references in both the
13 *Declaratory Order* and the *ISP Remand Order* that make it clear that the FCC
14 intended that an *ISP* server or modem bank be located in the same LCA as the
15 end-user customer initiating the call. Third, Level 3’s argument continues to
16 confuse the FCC’s jurisdictional analysis of *ISP*-bound traffic with the definition
17 of how that traffic is provisioned. The FCC has consistently held that *ISP*-bound
18 traffic is “predominately interstate for jurisdictional purposes.” The *ISP Remand*
19 *Order* did nothing to change that determination. Likewise, the *ISP Remand Order*
20 preserved the FCC’s holding in the *Declaratory Ruling*, which defined *ISP*-bound
21 traffic to require *ISP* servers or modems to be located in the same LCA as the
22 end-users initiating the call. (*Oregon ALJ Decision* at 9-10; footnotes omitted).

23 Judge Petrillo cited five paragraphs from the *ISP Declaratory Order* and three from the *ISP*
24 *Remand Order*, all of which characterize the *ISP*-bound traffic at issue as traffic originating and
25 terminating in the same LCA.²¹ Judge Petrillo’s decision is consistent with the language of the

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superseding order.”); *see also Hawaiian Tel. Co. v. Hawaii Pub. Util. Comm’n*, 827 F.2d 1264, 1266 (9th Cir. 1987); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm’n*, 738 F.2d 901, 907 (8th Cir. 1984) *vacated on other grounds*, 476 U.S. 1167 (1986); *Southwestern Bell Tel. Co. v. Texas Pub. Util. Comm’n*, 812 F. Supp. 706, 708 (W.D. Tex. 1993).

²⁰ Ruling, *In the Matter of Qwest Corporation vs. Level 3 Communications, LLC, Complaint for Enforcement of Interconnection Agreement*, IC 12 (Oreg. PUC, ALJ Petrillo, August 16, 2005) (“*Oregon ALJ Decision*”) (A copy is attached as Exhibit B).

²¹ *Id.* at 10, n. 36, citing paragraphs 4, 7, 8, 12, 24 (n. 77) and 27 from the *ISP Declaratory Order*, and paragraphs 10, 13, and 24 of the *ISP Remand Order*.

1 *ISP Remand Order* and the *WorldCom* court's explicit description of the holding of the *ISP*
2 *Remand Order*. Any other interpretation requires the decision maker to ignore major portions of
3 the *ISP Remand Order*, not to mention substitute its judgment for that of the *WorldCom* court,
4 and thus violate the law that requires that deference be granted to the decisions of the Hobbs Act
5 court. The Indiana commission, consistent with the *Oregon ALJ Order*, likewise concluded that
6 the *ISP Remand Order* is limited to local ISP traffic.²²

7 Another Oregon decision is also relevant on this issue. The VNXX issue was also
8 addressed in a recent federal district court decision in Oregon, *Qwest Corp. v. Universal*
9 *Telecom, Inc.*²³ In that case, the CLEC (whose business plan is virtually identical to Level 3's)
10 argued that Qwest should pay reciprocal compensation on VNXX traffic. The Court first
11 discussed the definition of "local traffic" as contained in Qwest's Oregon tariff and the parties'
12 ICA, which is consistent with the definition of local traffic in this case. The Court concluded:

13 [F]or a call to be local and subject to reciprocal compensation, it must originate at
14 some physical location within a LCA or EAS²⁴ and terminated at a physical
15 location within the same LCA or EAS. Specifically here, for an ISP bound call to
16 be subject to reciprocal compensation it must originate in a LCA or EAS and
17 terminate in that same LCA or EAS by delivery of the call to the ISP. VNXX
traffic does not meet the definition of local traffic because it does not originate
and terminate in the same LCA or EAS; it instead crosses LCAs and EASs.
*Therefore, VNXX traffic, whether ISP bound or not, is not subject to reciprocal
compensation.* (2004 WL 2958421 at *10; emphasis added).

18 ²² Order, *In the Matter of Level 3 Communications, LLC's Petition for Arbitration Pursuant*
19 *to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications*
20 *Act of 1996, and the Applicable State Laws for Rates, Terms, and Conditions of Interconnection*
21 *with Indiana Bell Telephone Co. d/b/a SBC Indiana*, Cause No. 42663 INT-01, 2004 WL
22 3140675, at *63 (Indiana Utility Reg. Comm'n, December 22, 2004) ("It is clear that the *ISP*
23 *Remand Order's* rates plan for ISP-Bound traffic applies only to ISP-Bound traffic that
24 terminates at an ISP in the same local exchange in which the call originates. The issue addressed
by the FCC in the *ISP Remand Order* was whether, as the CLECs contended, traffic bound to an
ISP 'in the same local calling area' was local traffic subject to reciprocal compensation under
Section 251(b)(5). The FCC did not address traffic bound to an ISP in a different local calling
area.").

25 ²³ 2004 WL 2958421 (D. Ore. 2004).

26 ²⁴ The court defined EAS "as essentially a large LCA, which is used to allow local calling
within a metropolitan area." *Id.* at *9, n. 3. Thus, LCA and EAS are synonymous in the
Universal decision.

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Thus, a clear underlying assumption of the *Universal* decision is that ISP VNXX traffic is not preempted by the *ISP Remand Order*.

B. VNXX is Inconsistent with Arizona Law.

Arizona law overwhelmingly and explicitly rejects Level 3's argument that local calling is based on the NPA-NXXs of the parties to the call, and directly requires that the local/interexchange distinction be determined by the relative physical location of the parties to the call.

1. Arizona Statutes.

Arizona Code § 40-329 (a statute that long preceded the 1996 Act) grants the Commission authority to require that two telephone corporations connect to each other. The statute contains an exception "where the purpose of the connection is primarily to secure transmission of *local messages or conversations between points within the same city, or town.*" The importance of this section to the present issue is not that Qwest could refuse interconnection for local messages (that issue having been resolved by section 252(c)(2) of the 1996 Act), but rather the fact that Arizona statutes define local messages as taking place "between points within the same city, or town." This statute defines local calling in terms of the geographical proximity of the parties to the call. This concept of the local calling provides a fundamental building block to telecommunications in Arizona. As already noted, consistent with the statutory direction, the Commission has historically taken an active role in the definition of LCA's based primarily on the existence or non-existence of a community of interest among the residents and businesses of

1 specific geographical locations.²⁵

2 This distinction between local and toll has also been recognized in an Arizona statute in
3 the age of local competition. ARS 40-282(C)(2)(a)-(b) contemplates separate certification for
4 “local exchange” carriers on the one hand, and “interexchange” carriers on the other.

5
6 **2. Commission Rules.**

7
8 **a. Commission Rules Define Local and Interexchange Services in Terms**
9 **of the Geographic Proximity of the Parties to a Call**

10
11 Commission rules consistently and extensively define local and interexchange services in
12 terms of the geographic proximity of the parties to a call (or the lack thereof). The
13 Commission’s “Competitive Telecommunications Services” rule ties local exchange traffic to
14 traffic *within* exchange areas. This rule defines “Local Exchange Service” as “[t]he
15 telecommunications service that provides a local dial tone, access line, and *local usage within an*
16 *exchange or local calling area.*” A.A.C. R14-2-1102(8) (Emphasis added). The Commission’s
17 “Telephone Utilities” rule defines “toll service” as service “between stations in different
18 exchange areas for which a long distance charge is applicable”. A.A.C. R14-2-501(23). And the
19 Commission’s “Telecommunications Interconnection and Unbundling” rule states: “the
20 incumbent LEC’s *local calling areas and existing EAS boundaries* will be utilized for the
21 purpose of classifying traffic as local, EAS, or toll for purposes of *intercompany compensation.*”
22 A.A.C. R14-2-1305(A) (Emphasis added). There are a number of other pertinent rules and
23 definitions in the Arizona Administrative Code:

24 ‘Extended Area Service’ or “EAS” means *local (toll-free) calling*
25 *provided between local exchange carrier exchanges (service areas).*
A.A.C. R14-2-13092(9). (Emphasis added).

26 ²⁵ See, fn.7, *supra*.

1 'Local Exchange Service.' Telecommunications service that provides a
2 local dial tone, access line, and local usage *within an exchange or local*
3 *calling area*. A.A.C. R14-2-1102(8). (Emphasis added.)

3 'Local and Toll Rating Centers.'

4 A. The incumbent LEC's *local calling areas and existing EAS*
5 *boundaries* will be Utilities for the purpose of intercompany
6 compensation.

7 B. All LEC's will use central office codes with rate centers
8 matching the Incumbent LEC's rate centers. A.A.C. R14-2-1305.
9 (Emphasis added.)

10 'Rate Center' means specific *geographic locations* from which airline
11 mileage measurements are determined for the purposes of *rating local,*
12 *Extended Area Service (EAS), and toll traffic*. A.A.C. R14-2-1302(19).
13 (Emphasis added.)

14 'Reciprocal Compensation' means the arrangement by which local
15 exchange carriers compensate each other for like services used in the
16 *termination of local calls* between the customers of the two carriers.
17 A.A.C. R14-2-1302(20). (Emphasis added.)

18 Read together, these provisions could not be more clear in requiring that local and toll
19 traffic be defined in terms of the geographical location of the parties to the call. In fact, § R14-2-
20 1305(A) is explicit that *all* carriers comply with local calling areas and EAS boundaries (a
21 geographical concept) for purposes of intercompany compensation.

22 3. Commission Precedent.

23 Qwest's position in this litigation is consistent with recent precedent established by this
24 Commission in a 2004 decision in an arbitration between Qwest and AT&T.²⁶ In that case
25 AT&T, like Level 3 in this case proposed to define "EAS/Local Traffic" by "the calling and
26

²⁶ Opinion and Order, *In the Matter of the Petition of AT&T Communications of the Mountain States, Inc. and TCG Phoenix, Inc. for Arbitration with Qwest Corporation, inc. Pursuant to 47 U.S.C. § 252(b)*, Docket Nos. T-02428A-03-0553, T-0105B-03-0553, Decision No. 66888 at 13 (Ariz. Corp. Comm'n., Dec. 17, 2003) at 13.

1 called NPA/NXXs.” The arguments advanced by AT&T in that case were strikingly similar to
2 those raised here by Level 3. The Commission rejected AT&T’s arguments and emphasized the
3 need for broad industry participation where long-standing rules or practice are sought to be
4 altered:

5 We find that Qwest’s proposed definition of “Exchange Service” comports with
6 existing law and rules, and should be adopted. *AT&T’s proposed definition*
7 *represents a departure from the establishment of local calling areas and may*
8 *have unintended affect beyond the issues discussed herein and be subject to*
9 *abuse. Commission Staff did not participate in this arbitration proceeding. We do*
10 *not believe that it would be good public policy to alter long-standing rules or*
11 *practice without broader industry and public participation.* (Emphasis added).

12 This conclusion directly supports Qwest’s position in this case. Just as in the *AT&T Arbitration*
13 *Decision* case, the changes proposed by Level 3 are not just minor adjustments to the language of
14 an interconnection agreement. Rather, they represent dramatic changes in policy that would
15 ultimately affect the whole industry in Arizona. Changes of this nature should not be made
16 without careful consideration of their impacts and only after considering input from a broader
17 range of interested parties than are represented in this arbitration docket.

18 **4. Qwest Arizona Tariffs.**

19 Qwest’s Arizona tariffs are completely consistent with Arizona statutes and rules.
20 Section 2.1 of Qwest’s Exchange and Network Services Price Cap Tariff defines an “exchange”
21 as a “geographical unit, established by the Company, for the administration of
22 telecommunications services in a specified area.” This tariff also defines “exchange service” as
23 “[t]he service of furnishing equipment and facilities for telephone communications *within* a
24 designated area.” (Emphasis added). In turn, “exchange service area” is defined as “[t]he
25 territory served by an exchange.” This same section defines “local exchange service” as “[t]he
26 furnishing of telecommunications services to the Company’s customers *within an exchange for*
local calling. This service also provides access to and from the telecommunications network for

1 long distance calling.” Further, this section defines “local service area or extended local service
2 area” as “[t]hat area throughout which an exchange service customer, at a given rate, may make
3 calls without the payment of a toll charge. A local service area may be made up of one or more
4 exchange areas.”

5 Section 5.1 of Qwest’s tariff, “Exchange Areas,” states that “[t]he Company develops
6 exchange service areas to establish service *within a defined geographical area.*” (Emphasis
7 added). Finally, Section 5.2 states that the rates and charges quoted for “local exchange service.
8 . . . entitle the customer to *local calls*, without toll charges, *to all local exchange access lines*
9 *connected to a CO of the exchange*, or to all exchange access lines serviced by COs of the
10 extended local service area where comprised of more than one exchange.” (Emphasis added).

11 Section 2.2 of Qwest’s tariff provides:

12 A customer shall not provide switched voice or data communications between
13 local exchange areas, including the bridging of Extended Area Service (EAS)
14 zones, using underlying services from this Tariff or the Exchange and network
15 Services Catalog. Providers of interexchange service, that furnish service between
16 local calling areas, must purchase services from the Access Service Tariff for their
17 use in furnishing their authorized intrastate telecommunications services to end
18 user customers.²⁷

19 As with all other aspects of the Arizona statutes, rules, and the Commission prior
20 decision in the *AT&T Arbitration Decision*, Qwest’s approved tariffs define local and toll or long
21 distance services in terms of geography—nothing in any of them suggests they are based on
22 telephone numbers. In addition, the FCC has consistently ruled that it is the state commissions
23 that have the authority to define local calling areas and determine whether reciprocal
24 compensation or access charges apply to particular traffic.²⁸

25 ²⁷ Qwest Corporation Exchange and Network Services Price Cap Tariff, p. 16, Section
26 2.2.1.C.4.

²⁸ *Local Competition Order* ¶ 1035 (With the exception of wireless traffic, “state
commissions have the authority to determine what geographic areas should be considered ‘local
areas’ for the purposes of applying reciprocal compensation obligations under section 251(b)(5),
consistent with the commissions’ historical practice of defining local service areas for wireline
LECs. *Traffic originating or terminating outside the applicable local area would be subject to
interstate and intrastate access charges.*”) (emphasis added); accord Memorandum Opinion and

1
2 **5. VNXX Is Improper Under Arizona Rules and Industry Guidelines.**
3

4 Level 3's assignment of telephone numbers in the manner sought in its Petition is not
5 consistent with the telecommunications industry's numbering resource guidelines, and the
6 Commission's rule that adopts industry central office code assignment guidelines. Rule 1305(B)
7 requires all LECs to use central office codes with rate centers matching the incumbent LEC's
8 rate centers. The Commission defines "central office codes" as "the first three digits of a 7-digit
9 telephone number . . . assigned by the central office code administrator in accordance with the
10 industry's central office code assignment guidelines." (See, A.A.C. R14-2-1302.4).

11
12 **a. Industry guidelines exist to govern the proper use of numbering resources,**
13 **and Level 3 is required to adhere to those guidelines.**
14

15 In 1995, prior to the passage of the Act, the FCC created the North American Numbering
16 Council ("NANC") to make recommendations to the FCC on numbering issues and oversee the
17 North American Numbering Plan ("NANP"). At the same time, the FCC also created the North
18 American Numbering Plan Administrator ("NANPA"), an impartial entity responsible for
19 assigning and administering telecommunications numbering resources in an efficient and non-
20 discriminatory manner. NANPA is thus responsible for allocating NPA and NXX codes. Under
21 FCC rules, NANPA is directed to administer numbering resources in an efficient and non-

22 *Order, In the Matter of the Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the*
23 *Communications Act for Preemption of Jurisdiction of the Virginia State Corporation*
24 *Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Expedited*
25 *Arbitration*, 17 FCC Rcd 27,039, ¶ 549 (Wireline Competition Bureau, July 17, 2002) ("*Virginia*
26 *Arbitration Order*") (specifically relying on paragraph 1035 of the *Local Competition Order* for
the proposition that the FCC "previously held that state commissions have authority to determine
whether calls passing between LECs should be subject to access charges or reciprocal
compensation . . .").

1 discriminatory manner, *and* in accordance with the guidelines developed by INC (the North
2 American Industry Numbering Committee). 47 C.F.R. § 52.13(b) and (d).

3 Thus, to the extent INC “guidelines” exist, they are more than just guidelines – adherence
4 to them is an FCC mandate. And INC guidelines do exist. The Alliance for
5 Telecommunications Industry Solutions (ATIS) has published a set of INC guidelines entitled
6 “Central Office Code (NXX) Assignment Guidelines (COCAG).” A copy of the INC COCAG
7 guidelines was attached as Exhibit B to Qwest’s Answer in this proceeding.

8

9 **b. Level 3’s use of VNXX is in violation of industry guidelines which**
10 **designate NPA-NXX codes as geographically-specific.**

11

12 Section 2.14 of the COCAG states that “CO [central office] codes/blocks allocated to a
13 wireline service provider are to be utilized to provide service to a customer’s premise *physically*
14 *located* in the same rate center that the CO codes/blocks are assigned. Exceptions exist, such as
15 for tariffed services like foreign exchange services.” (Emphasis added.) VNXX is not identified
16 as an exception, and is certainly not an “exception” as used by Level 3.

17 In addition, Section 4.2.6 of the COCAG provides that “[t]he numbers assigned to the
18 facilities identified must serve subscribers in the *geographic area corresponding with the rate*
19 *center requested.*” (Emphasis added.)

20 Finally, “Geographic NPAs” are the “NPAs which correspond to discrete geographic
21 areas within the NANP” while “Non-geographic NPAs” are “NPAs that do not correspond to
22 discrete geographic areas, but which are instead assigned for services with attributes,
23 functionalities, or requirements that transcend specific geographic boundaries, the common
24 examples [of which] are NPAs in the N00 format, e.g., 800.” COCAG, § 13.0.

25 The numbers that Level 3 uses in Arizona are all Geographic NPA numbers. In other
26 words, they are numbers that should, according to COCAG guidelines, correspond to discrete

1 geographic areas. Under Level 3's misassignment of these numbers, however, these numbers no
2 longer bear any relationship to a specific geographic location. This use of numbers is in
3 violation of the industry guidelines.

4
5 **6. Under Arizona Law, Calls Are Categorized As Local Or Toll Based On The**
6 **Geographic Proximity Of The Calling And Called Parties; Telephone Numbers Are**
7 **Supposed To Be Assigned Consistent With This Categorization Scheme.**

8
9 Geographical proximity within a defined local area, not telephone numbers, has always
10 been the legal test in Arizona of whether a call is local. Level 3's notion that calls are local
11 based on the number they have assigned (in violation of Commission rules and industry
12 guidelines) is an example of getting the cause and effect relationship between two concepts
13 backwards. Telephone numbers are supposed to be assigned to specific geographic areas so that
14 they can be used to properly rate calls. Level 3 argues that, because telephone numbers have
15 been the means of rating calls as local or interexchange, telephone companies and state
16 commissions had made a conscious conclusion that physical location is not relevant to call
17 classification and that assigned telephone numbers are the only criterion. In other words, Level 3
18 implies that community of interest, distance, and the geographical location of parties to a call
19 were never relevant factors and that the only relevant factor was the relationship between the
20 assigned telephone numbers. As demonstrated above, this argument has no legal basis in
21 Arizona. Geographical proximity has always been both the basis for assigning telephone
22 numbers and the basis for rating calls as local or interexchange. The telephone numbers, because
23 they were historically linked with the exchange where the customer was located, were the means
24 of assuring geographical proximity; in other words, telephone numbers were the means, not the
25 end.

26 From a purely common sense perspective, the Level 3 argument simply ignores LCAs,

1 the fundamental building block of telecommunications in Arizona and in every other state. No
2 LCA in Arizona has been established without the companies who would be providing service
3 obtaining Commission approval. Geography and the location of called and calling parties have
4 been concepts inherent in the determination of LCAs in Arizona.

5 Finally, a simple examination of the nomenclature used to distinguish local from long
6 distance is revealing. The use of the word "local" is not an accident: the concept of calling
7 *within* a certain specified geographical area where the residents and businesses share a
8 geographically-based community of interest has been plainly distinguished from "long distance"
9 *calls between* geographical areas, often hundreds of miles apart, where no community of interest
10 exists. The Commission has always treated local calls differently from toll calls. So that local
11 calling within an area of community of interest is not constrained, local service prices are flat-
12 rated. To suggest, as Level 3 does, that local service in Arizona is based purely on telephone
13 numbers and not on geographical proximity is revisionist history at its worst.

14
15 **C. The Commission Has the Authority to Ban the Use of VNXX in Arizona and Should**
16 **Do So.**

17
18 One clear option open to the Commission is to simply ban the use of VNXX in Arizona.
19 This option was adopted by the Vermont Board. In its order, which was reviewed by a federal
20 district court in *Global NAPS, Inc. v. Verizon New England ("Global Naps")*,²⁹ the Vermont
21 Board ruled that the local/toll distinction is based on "the physical termination points of the
22 calls." (*Global NAPS* at 298). It also banned the CLEC's use of VNXX in Vermont. (*Id.*). The
23 CLEC (Global) raised numerous objections to the board's decision on appeal, from a
24 discrimination claim to a filed rate doctrine argument. The federal district court, however,
25 dismissed these objections:

26 ²⁹ 327 F.Supp.2d 290 (D. Vt. 2004).

1 The Board's prohibition of VNXX service offends neither the "nondiscrimination
2 strand" nor the "nonjusticiability strand" of the filed rate doctrine. The ban does
3 not have the effect of discriminating, or requiring Global to discriminate, among
4 Global's customers; it simply does not permit Global to offer the service to any of
5 its customers. A ban on VNXX service likewise does not involve the Board or
6 this Court in any determination of whether the rates or terms of the service are
reasonable. The Board's ban has not varied the rates or terms of Global's tariff,
nor has it attempted to enforce obligations between Global and its customers that
do not appear in the federal tariff. The filed rates doctrine does not prevent the
Public Service Board from prohibiting the use of VNXX within Vermont. (*Id.* at
301)

7 Qwest requests that the Commission follow the example set by the Vermont Board and simply
8 ban the use of VNXX in Arizona.

9
10 **D. The Parties' ICA does not Contemplate Exchange of VNXX Traffic.**

11
12 Level 3's conduct violates the parties' Interconnection Agreement.³⁰ The ISP
13 Amendment that Level 3 and Qwest executed and that Level 3 refers to in its Petition provides
14 that "ISP-bound traffic" is "as that term is used in the FCC ISP Order" (ISP Amendment, § 2.)³¹
15 As discussed above, the *ISP Remand Order* did not intentionally or accidentally include traffic
16 destined for an ISP server physically located in a different LCA than the originating caller as part
17 of the "ISP-Bound traffic" addressed in the Order. Thus, VNXX traffic is not "ISP-Bound" as
18 discussed or defined in the ISP Amendment.

19 Level 3, however, seeks to sweep aside these definitions by assuming that all traffic
20 destined for the Internet automatically falls within the definition of "ISP-bound traffic,"
21 regardless of where the traffic physically originates and terminates. Indeed, Level 3 ignores the
22 FCC history of defining traffic destined for an ISP as traffic that travels solely *within* a LCA
23 prior to being delivered to the ISP's server and subsequently the Internet. Level 3 also ignores
24

25 ³⁰ Relevant sections of the Interconnection Agreement are attached to Qwest's Answer,
26 Exhibits A, D, and E.

³¹ A copy of the ISP Amendment is attached to Qwest's Answer as Exhibit D.

1 long-standing industry practice of treating calls dialed as 1+ calls to the Internet as being toll
2 calls.

3 As noted, Level 3's argument contradicts the definitions in the interconnection
4 agreement. Level 3's interconnection agreement has a definition of "Exchange Service" similar
5 to the AT&T agreement. As noted above (see page 22), the Arizona Commission found that the
6 definition of "Exchange Service" in the AT&T interconnection agreement was dispositive of the
7 VNXX issue. Specifically, the definition in the AT&T agreement (§ 4.0) is as follows:
8 "Exchange Service' or 'Extended Area Service (EAS)/Local Traffic' means traffic that is
9 originated and terminated within the same LCA which has been defined by the Commission and
10 document in applicable tariffs." The definition in Level 3's agreement (§ 4.22) is identical.

11
12 **E. Intercarrier Compensation is not Appropriate for VNXX Traffic Under the ISP**
13 **Remand Order.**

14
15 The discussion above about the *ISP Remand Order* (¶¶ 30-40) establishes that the
16 compensation scheme established by that Order is limited to local ISP traffic, where the calling
17 party and the ISP's server are located in the same LCA.

18 Furthermore, sound public policy counsels against permitting Level 3 to recover
19 intercarrier compensation on VNXX traffic. The customer who places a call to an ISP is a
20 customer of the ISP on Level 3's network. If Level 3 is allowed to collect intercarrier
21 compensation for traffic that is properly thought of as Level 3's own toll traffic, the end result is
22 regulatory arbitrage in which Level 3 profits at Qwest's expense. Level 3 will collect revenue
23 primarily from other carriers rather than its own customers. Such a result creates incentives for
24 the inefficient entry of CLECs that will seek to serve ISPs exclusively, and not offer viable local
25 telephone competition as Congress intended in the Act. Moreover, the large one-way flows of
26 cash make it possible for CLECs to refrain from charging ISPs for services. This practice affects

1 competition for ISP business, and drives ISP rates to consumers to uneconomical levels. In
2 short, intercarrier payments for ISP traffic create severe market distortions.³²

3 Level 3 argues for the precise opportunity condemned by the FCC in the *ISP Remand*
4 *Order*. Level 3 has an economic incentive to create as many usage minutes as possible, because
5 every minute that an end-user customer spends connected to a Level 3 ISP generates additional
6 compensation for Level 3. Level 3 does not make retail local telephone service available to
7 Arizona customers.

8 Contrast the scenario that Level 3 desires with the world envisioned by the drafters of the
9 1996 Act. The drafters saw a market in which carriers actively competed to provide “local
10 exchange service” to customers. Thus, CLECs would actually build alternative networks, all of
11 which would benefit customers and provide them with more competitive choices, create
12 balanced exchanges of traffic, and reciprocal compensation would provide revenues to
13 companies that built real alternative telecommunications networks. None of those things is
14 present here.

15 The FCC’s analysis in the *ISP Remand Order* is instructive on this point. The FCC
16 recognized that “Internet consumers may stay on the network much longer than the design
17 expectations of a network engineered primarily for voice communications.” (*ISP Remand Order*
18 ¶ 19). The FCC also noted that “[t]raditionally, telephone carriers would interconnect with each
19 other to deliver calls to each other’s customers” and that it “was generally assumed that traffic
20 back and forth on these interconnected networks would be relatively balanced.” (*Id.* ¶ 20) Not so
21 in the case of Level 3. It provides no local exchange services; thus, every minute of use flows
22 one-way to Level 3, thus generating revenue, while Level 3 sends no traffic back because it does
23 not even pretend to provide local telecommunications service.

24 In the FCC’s view,

25 “Internet usage has distorted the traditional assumptions because traffic to an ISP

26 ³² *ISP Remand Order*, ¶¶ 70-71, 74-76.

1 flows exclusively in one direction, creating an opportunity for regulatory arbitrage
2 and leading to uneconomical results.”(Id. ¶ 21) This situation led to classic
3 regulatory arbitrage that had two troubling effects: (1) it created incentives for
4 inefficient entry of LECs intent on serving ISPs exclusively and not offering
viable local telephone competition, as Congress had intended to facilitate with the
1996 Act; (2) the large one-way flows of cash made it possible for LECs serving
ISPs to afford to pay their own customers to use their services, potentially driving
ISP rates to consumers to uneconomical levels. (Id.)

5 The FCC thus concluded “that intercarrier payments for ISP-bound traffic have created severe
6 market distortions.” (Id. ¶ 76). Level 3 is a perfect example of the economic distortions and
7 arbitrage abuses the FCC described. The Commission should make its decisions in this docket
8 based upon the law, but those legal decisions should be informed by the underlying policies that
9 the FCC, the Commission, and other state commissions have crafted in an attempt to rationally
10 apply the 1996 Act to prevent regulatory distortions from destroying the effort to foster
11 meaningful local exchange competition. Level 3’s erroneous interpretations would not only
12 enable, but also encourage these kinds of arbitrage opportunities, and should be rejected

13
14 **F. Qwest Negotiated in Good Faith For an Amendment Reflecting the Core**
15 **Forbearance Order**

16
17 In Count Two of the Complaint, Level 3 alleges that Qwest has failed to negotiate in
18 good faith regarding changes in law brought about by the *ISP Remand Order* and the *Core*
19 *Forbearance Order*. The parties have a different interpretation of the *Core Forbearance Order*
20 and regarding the issue whether Level 3 is entitled to compensation for VNXX-based traffic
21 originating in one local calling area and terminating to an ISP physically located in a different
22 local calling area. Clearly, the fact that parties are unable to reach resolution of a matter about
23 which they disagree on the fundamental legal principles does not in and of itself evidence lack of
24 good faith.

25 In this matter, the attachments to the Complaint and Qwest’s Answer document that the
26 parties engaged in an exchange of proposals to amend the ICA to reflect the Core Forbearance

1 Order. It is not clear whether the proper protocols for such a proposal were followed by Level 3;
2 what is clear however is that the very issue about which the parties could not agree is whether
3 Qwest must pay compensation on VNXX – delivered traffic destined for Level 3’s ISP
4 customers. The evidence shows that Qwest participated in those negotiations in good faith and
5 that it proposed language consistent with its interpretation of the Core Forbearance Order.

6 Furthermore, the ICA sets forth a specific process for addressing changes in applicable
7 law, and if negotiations are unsuccessful, the parties are to bring the dispute to this Commission
8 for resolution of appropriate amendment language. Level 3 has ignored this process, billed
9 Qwest without an amendment, and then brought this complaint rather than a dispute resolution
10 request as Section 2.2 of the ICA requires.

11 In the Complaint Level 3 has not identified any conduct, distinct from Qwest’s refusal to
12 give up its good faith interpretation of the law, which would warrant a finding that Qwest did not
13 negotiate in good faith. It is an improper and dangerous game for Level 3 to play to suggest that
14 all legal disagreements should amount to willful and bad faith violations of legal obligations.
15 This case is nothing more than a dispute over legal principles and should be treated as such.
16 Because, as has been detailed in this brief, Qwest’s positions were not only good faith positions
17 but the legally correct ones, the Commission should dismiss Level 3’s Count Two.

18 19 **IV. QWEST’S COUNTERCLAIMS** 20

21 Qwest has presented five counterclaims in this matter. Based on the information and
22 arguments made herein, the Commission should invalidate Level 3’s bills, ban the use of VNXX
23 traffic routing, and grant Qwest’s counterclaims and find that Level 3 is in violation of the *ISP*
24 *Remand Order* by charging intercarrier compensation for non-local ISP-VNXX traffic (Count 1);
25 the Commission should rule that Level 3 is in violation of state law regarding the proper
26 definitions of local service by virtue of its use of VNXX numbering and its attempts to bill

1 Qwest the *ISP Remand Order* rate for such VNXX traffic(Count 2); the Commission should rule
2 that Level 3 is in violation of the ICA by reason of its attempt to subvert the ICA change of law
3 and dispute resolution process by billing Qwest for traffic that is not covered by the ISP Remand
4 Order (Count 3); and the Commission should rule that by reason of its knowing misassignment
5 of local telephone numbers to ISP service which are physically located outside the local area to
6 which the telephone number is assigned, Level 3 is in violation of Section 13.4 of the ICA
7 (Count 4).

8 With regard to Count 5, the Commission should also find in Qwest's favor and order
9 Level 3 to cease using LIS trunks to route VNXX traffic. Level 3 has argued that the parties
10 have agreed to exchange VNXX traffic over LIS trunks. Qwest disagrees. None of the traffic
11 types that the parties specifically agreed to exchange match this VNXX traffic. Section 7.2.1.2
12 of the parties' ICA specifically delineates the types of traffic to be exchanged under the ICA.
13 With respect to the traffic and disputes at issue in this matter, there are three relevant types of
14 traffic that are appropriately exchanged under the ICA and under the parties' SPOP Amendment
15 to the ICA: (1) Exchange Access (intraLATA Toll non IXC) traffic, (2) Jointly Provided
16 Switched Access (interLATA and intraLATA IXC) traffic (also known as "Meet-Point Billing"
17 or "MPB") and (3) Exchange Service or EAS/Local Traffic. (*See SPOP Amendment,*
18 *Attachment 1, § 1.*)³³

19 The ICA defines those categories of traffic as follows:

- 20
- 21 • "IntraLATA Toll (Exchange Access)" is defined in accordance with USW's [Qwest's]
22 current intraLATA toll serving areas, as determined by the Federal Communications
23 Commission." (ICA, § 4.30.)
 - 24 • "Meet-Point Billing" or "MPB" [also known as Provided Switched Access] refers to an
25 arrangement whereby two LECs (including a LEC and Co-Provider) jointly provide Switched

26 ³³ The SPOP Amendment is attached to Qwest's Answer as Exhibit E.

1 Access Service to an Interexchange Carrier, with each LEC (or Co-Provider) receiving an
2 appropriate share of the revenues as defined by their effective access Tariffs. (*Id.*, § 4.39.)

3 • “Extended Area Service (EAS)/Local Traffic” (Exchange Service) means traffic that is
4 originated and terminated within a local calling area which has been defined by the Commission
5 and documented in applicable tariffs. (*Id.*, § 4.22.)

6 • “ISP-bound traffic” is defined by the ISP Amendment (§ 2) “as that term is used by the
7 FCC in the *ISP [Remand] Order*.” As already discussed above, Level 3’s contention that the
8 traffic at issue is entitled to treatment and compensation according to the *ISP Remand Order* is
9 incorrect and not an appropriate reading of that Order, and conflicts with the Commission
10 definition of local traffic in Arizona.

11
12 It is possible that Level 3 may argue (as some other carriers have attempted to claim),
13 that this traffic is “Exchange Service” traffic, commonly referred to as “EAS/Local traffic.”
14 “EAS/Local traffic,” however, is defined in Section 4.22 of the ICA as “traffic that is *originated*
15 *and terminated within a local calling area* which has been defined by the Commission and
16 documented in applicable tariffs.” (Emphasis added.) Even a cursory examination of the traffic
17 in dispute here demonstrates that it does not meet this definition. Even though VNXX is not
18 terminated at an ISP server that is in the same LCA as the originating caller, Level 3 has
19 nevertheless claimed that it is “ISP-bound” traffic. Thus, there should be no contention as to
20 whether the VNXX traffic at issue is “Exchange Service” traffic.

21 A traffic type that may *superficially appear* to apply to the VNXX traffic at issue is under
22 the definition of “Exchange Access” traffic, which is defined in Section (A)2.25 of Level 3’s
23 ICA as being “in accordance with USW’s current intraLATA toll serving areas, as determined by
24 the Federal Communications Commission.” Although this may appear functionally appropriate,
25 upon closer examination the traffic does not meet this definition either.

26 As a threshold matter, only Level 3 knows the exact location of the ISP. Thus, Qwest

1 cannot completely determine for any given call whether the call is destined for a location within
2 the LCA or in a different LCA. Qwest only knows how far it has carried the call before handoff
3 to the interconnected carrier, where that carrier's serving switch is located, and whether traffic is
4 one-way or two-way. In addition, even for traffic that may functionally appear to match the
5 LCA definition, Level 3's use of VNXX telephone numbers makes it difficult to track such
6 traffic. Level 3 clearly does not intend for the traffic to be treated as "Exchange Access" traffic
7 under the ICA, as evidenced by its misuse of telephone numbers.

8 Finally, the last possible traffic type, "Meet-Point Billing" or "Jointly Provided Switched
9 Access," does not match up to the VNXX traffic at issue either. This is so because no IXC is
10 involved, as only Level 3 and Qwest are involved in the carriage of the traffic, which is contrary
11 to the definition of the traffic in Section (A)2.32 of the ICA.

12 Therefore, in reviewing the ICA's plain language and the VNXX traffic that Level 3
13 causes Qwest to exchange, none of the traffic types that the parties specifically agreed to
14 exchange match this VNXX traffic. Since Level 3 can easily remedy the situation by properly
15 assigning telephone numbers based on the actual location of its end user customers, it is
16 incumbent upon Level 3 to ensure that the exchange of traffic under the ICA follows the terms
17 and conditions of that Agreement. In the end, Level 3 is simply attempting to exchange traffic
18 that the parties never agreed to exchange under the terms of the ICA.

19

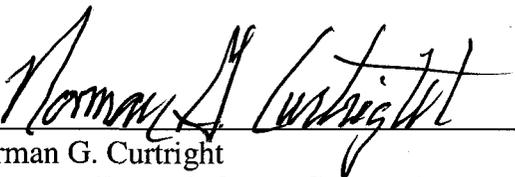
20 V. CONCLUSION AND REQUEST FOR RELIEF

21

22 For the reasons stated herein, the Commission should deny Level 3's complaint and issue
23 an order prohibiting Level 3 from assigning NPA/NXXs in LCAs other than the LCA where
24 Level 3's customer has a physical presence, requiring that Level 3 cease its misuse of such
25 telephone numbering resources, and requiring that Level 3 properly assign telephone numbers
26 based on the location where its customer has a physical presence. The Commission should Issue

1 an order prohibiting Level 3 from utilizing LIS facilities to route VNXX traffic. The
2 Commission should find that the parties' ICA does not require any compensation for Level 3's
3 VNXX traffic, and invalidate all Level 3 bills to Qwest seeking or charging reciprocal
4 compensation or the *ISP Remand Order* rate of \$0.0007 per minute for any of the VNXX traffic
5 described above. Further the Commission should direct Level 3 to follow the change of law
6 procedures contained in its interconnection agreement with Qwest to implement the *Core*
7 *Forbearance Order*.

8
9 RESPECTFULLY SUBMITTED this 30th day of November, 2005.

10
11
12 By 
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26

1 **Original and 13 copies of the foregoing**
2 **were filed this 30th day of November, 2005 with:**

3 Docket Control
4 Arizona Corporation Commission
5 1200 West Washington Street
6 Phoenix, AZ 85007

7 **COPY of the foregoing mailed/delivered/mailed**
8 **this 30th day of November, 2005 to:**

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27

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32

EXHIBIT A

VNXX Routing

..... Local Call to ISP - Qwest Pays Recip Comp

- - - - - VNXX Call to ISP - Calls not local and Recip Comp does not apply

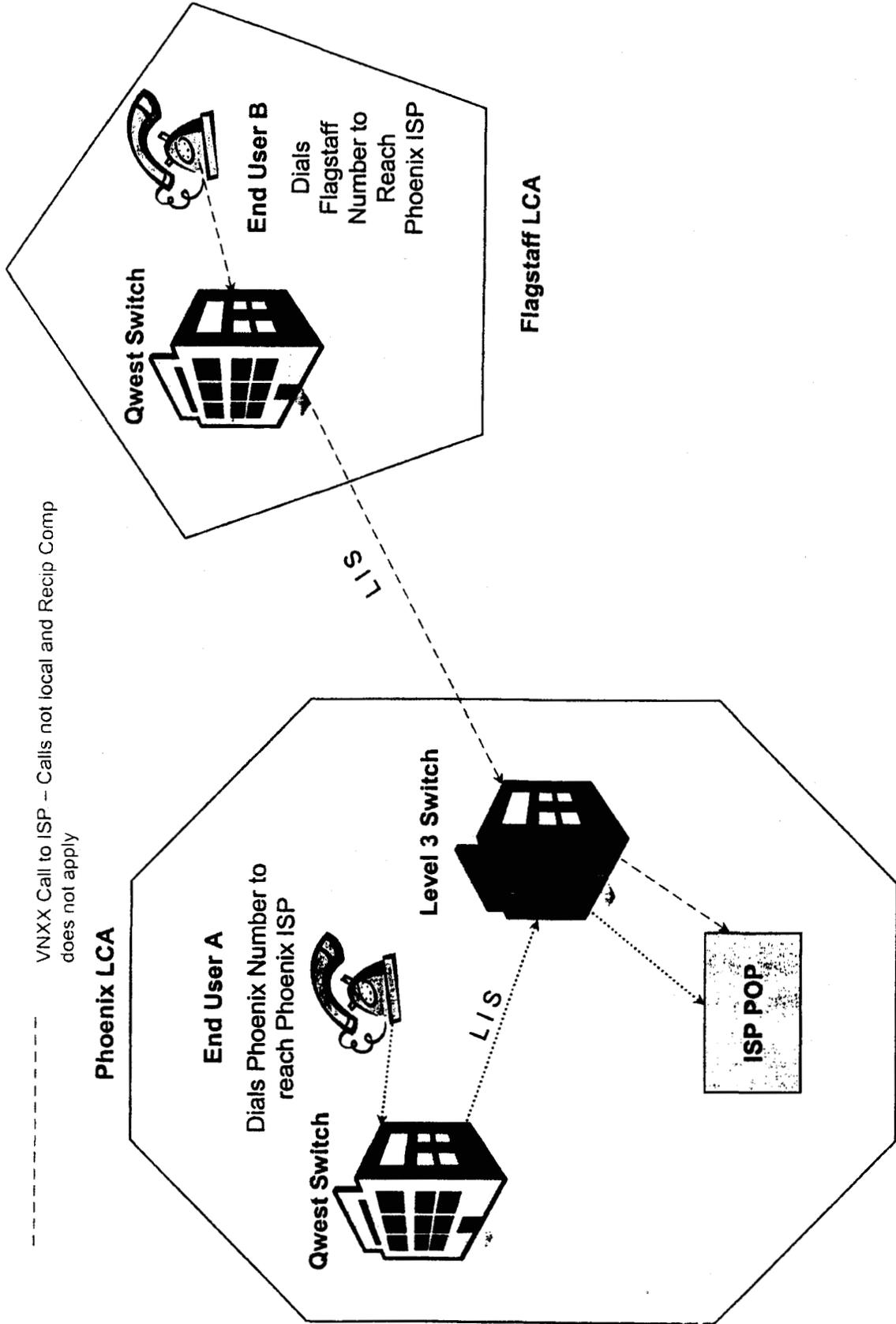


EXHIBIT B

ISSUED: August 16, 2005

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

IC 12

In the Matter of)
)
QWEST CORPORATION vs. LEVEL 3)
COMMUNICATIONS, LLC,) **RULING**
)
Complaint for Enforcement of Interconnection)
Agreement.)

**DISPOSITION: COMPENSATION FOR VNXX-ROUTED
ISP-BOUND TRAFFIC NOT AUTHORIZED
UNDER INTERCONNECTION AGREEMENT**

Procedural History

On June 6, 2005, Qwest Corporation (Qwest) filed a complaint against Level 3 Communications, LLC (Level 3), asserting that Level 3 is violating federal law, state law, and terms of the Interconnection Agreement (ICA) executed by the parties. Qwest alleges that Level 3 is assigning local telephone numbers to Internet Service Provider (ISP) customers, even though the ISP's modem banks (or servers) are not located within the local calling area to which those numbers have been assigned. Qwest asserts that Level 3 improperly seeks payment of reciprocal compensation for such 'Virtual NXX' (VNXX) traffic. Qwest further alleges that Level 3 is violating the ICA by obligating Qwest to send non-local ISP traffic over Local Interconnection Service (LIS) trunks.

Level 3 responded to Qwest's complaint on June 20, 2005. It denies the allegations in the complaint and counterclaims that Qwest is violating the ICA by refusing to compensate Level 3 for the transport and termination of Qwest-originated ISP-bound traffic. Level 3 also counterclaims that Qwest violated the ICA by failing to negotiate an amendment to the agreement reflecting the Federal Communications Commission's (FCC's) *Core Communications Order*.¹

¹ *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 (rel. Oct. 18, 2004) ("Core Communications Order")*.

A prehearing conference was held in this matter on June 30, 2005. On July 5, 2005, the ALJ issued a Memorandum requesting that the parties file briefs addressing whether the ICA requires compensation for the exchange of VNXX-routed ISP-bound traffic. Because Section 7.3.4.3 of the ICA provides that the parties shall exchange "ISP-bound traffic (as that term is used in the FCC ISP Order),"² a central issue in this complaint proceeding is whether the FCC's use of the term "ISP-bound traffic" in that order encompasses VNXX traffic.³ The parties filed briefs addressing that issue on July 18, 2005.

VNXX

In Order No. 04-504, the Commission described VNXX as follows:

The incumbent local telephone company does not have the exclusive right to assign specific phone numbers to specific customers. Competitive local exchange carriers (CLECs) are, by law, entitled to be assigned blocks of numbers in sequence, including entire NXXs. A 'Virtual NXX' (VNXX) occurs when a CLEC assigns a 'local' rate center code to a customer physically located in a 'foreign' rate center. For example, a customer physically located in Portland might order a phone number from a CLEC with a Salem NXX rate center code. Calls between that Portland customer's phone and other Salem area customers would be treated as if they were local calls, even though the calls between Salem and the customer's physical location in Portland is a distance of some 50 miles. Thus, under a CLEC's VNXX arrangement, all Salem customers would be paying a flat, monthly, local rate, even though they are calling the CLEC's Portland customer. When those same customers call the ILEC's Portland customers, served out of the same central office as the CLEC's Portland customer, they are charged intraLATA toll charges.

This type of service was not unknown to the telephone industry prior to the arrival of CLECs. For many years, incumbent carriers offered foreign exchange (FX) services, which, for an additional monthly fee, also provided

² The 'FCC ISP Order' is more commonly known as the 'ISP Remand Order.' I use the latter reference throughout this ruling. See, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-bound Traffic, Order on Remand and Report and Order*, 16 FCC Rcd 9151, para. 81, CC Docket No. 01-92, FCC 01-131, rel. April 27, 2000, *remanded sub nom. WorldCom Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *reh'g en banc denied*, (D.C. Cir. Sept. 24, 2002), *cert. denied*, 538 U.S. 1012 (May 5, 2003). ("ISP Remand Order.")

³ ALJ Memorandum, July 5, 2005, at 2.

business customers served out of one central office with numbers from an NXX assigned to another central office, usually so that their customers could call them without incurring intraLATA toll charges. By Order No. 83-869, issued almost 21 years ago, the Commission prohibited incumbent carriers from offering FX services to any new customers or adding additional FX lines for existing customers.⁴

For purposes of this case, "VNXX-routed ISP-Bound traffic" describes a situation wherein a CLEC, such as Level 3, obtains numbers for various locations within a state. Those numbers are assigned by the CLEC to its ISP customers even though the ISP has no physical presence (*i.e.*, does not locate its modem banks or server) within the local calling area ("LCA") associated with those telephone numbers. ISP-bound traffic directed to those numbers is routed to the CLEC's Point of Interconnection (POI) and then delivered to the ISP's modem bank/server at a physical location in another LCA.⁵

Qwest takes the position that the FCC's definition of ISP-bound traffic in the *ISP Remand Order*, and therefore Section 7.3.4.3 of the ICA, encompasses only those circumstances where an ISP modem bank/server is physically located in the same LCA as the end-user customer initiating an Internet call.⁶ Level 3, on the other hand, maintains that the *ISP Remand Order*, read in conjunction with the *Core Communications Order*, requires that reciprocal compensation must be paid on *all* ISP-bound traffic, including VNXX-routed ISP-bound traffic.

Applicable Law

Section 251(b)(5) of the Telecommunications Act of 1996 requires all local exchange carriers (LECs) to establish reciprocal compensation arrangements for the transport and termination of telecommunications. In its 1996 *Local Competition Order*,⁷ the FCC found that Section 251(b)(5) reciprocal compensation obligations "apply only

⁴ Order No. 04-504 at 2. (Footnotes omitted.)

⁵ Qwest notes that the ISP server or modem banks may be located in another state. VNXX arrangements can also exist for voice traffic. Qwest Brief at 1-2. See also, *In the Matter of the Investigation into the Use of Virtual NPA/NXX Calling Patterns*, OPUC Docket UM 1058, Order No. 04-504 (Sept. 7, 2004).

⁶ Thus, for intercarrier compensation purposes, Qwest states that the relevant endpoints are the physical location of the calling party and the physical location of the ISP's servers or modem banks. Qwest describes this arrangement as "local ISP traffic," to distinguish it from "VNXX-routed ISP-bound traffic."

⁷ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, FCC 96-325, First Report and Order, 11 FCC Rcd 15499 (1996), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 744 (8th Cir. 1997), *aff'd in part and remanded, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), on remand, *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *reversed in part sub nom. Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002). ("Local Competition Order.")

to traffic that originates and terminates *within a local area* as defined by the state commissions.”⁸

In its 1999 *Declaratory Ruling*, the FCC concluded that ISP-bound traffic was interstate traffic, and therefore not subject to the reciprocal compensation provisions of §251(b)(5).⁹ The FCC “reached this conclusion by applying its end-to-end analysis, traditionally employed in determining whether a call was jurisdictionally interstate or not, stressing that ISP-bound traffic ultimately reaches websites that are typically located out-of-state.”¹⁰

On review in *Bell Atlantic Tel. Cos. v. FCC*,¹¹ the United States Court of Appeals for the District of Columbia (D.C. Circuit) vacated and remanded the *Declaratory Ruling*. The Court held “that the [FCC’s] order had failed to adequately explain why the traditional ‘end-to-end’ jurisdictional analysis was relevant to deciding whether ISP calls fitted the local call or the long-distance call model.”¹²

On remand, the FCC again concluded that the reciprocal compensation provisions of §251(b)(5) should not govern the compensation between two LECs involved in delivering ISP-bound traffic.¹³ This time, however, the FCC abandoned the “local v. long distance” dichotomy used in the end-to-end analysis in the *Declaratory Ruling*.¹⁴ Instead, the FCC held that “under §251(g) of the Act it was authorized to

⁸ Local Competition Order at ¶1034, *ISP Remand Order* at ¶12. (Emphasis added.)

⁹ *ISP Remand Order* at ¶1.

¹⁰ *WorldCom Inc. v. FCC*, 288 F.3d 429, 431 (D.C. Circuit 2002) (*WorldCom*).

¹¹ *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 5, 8 (D.C. Cir. 2000) (*Bell Atlantic*).

¹² *WorldCom*, 288 F.3d at 431.

¹³ *Id.*

¹⁴ *ISP Remand Order* at ¶¶46-47, 54, 56; See also, *Pacific Bell v. Pac-West Telecom, Inc.*, 325 F.3d 1114, 1131 (9th Cir. 2003), *ISP Remand Order* at: In the *ISP Remand Order*, the FCC explained that it had erred by attempting to characterize ISP-bound traffic as “local” or “long distance.” It held, in part:

45...By indicating that all ‘local calls,’ however defined, would be subject to reciprocal compensation obligations under the Act, we overlooked the interplay between these two inter-related provisions of section 251 -- subsections (b) and (g). Further, we created unnecessary ambiguity for ourselves, and the court, because the statute does not define the term ‘local call,’ and thus that term could be interpreted as meaning either traffic subject to local rates or traffic that is *jurisdictionally* intrastate. In the context of ISP-bound traffic, as the court observed, our use of the term ‘local’ created a tension that undermined the prior order because the ESP exemption permitted ISPs to purchase access through local business tariffs, yet the jurisdictional nature of this traffic has long been recognized as interstate.

46. For similar reasons, we modify our analysis and conclusion in the *Local Competition Order*. There we held that ‘[t]ransport and termination of local traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 251(d)(2).’ We now hold

'carve out' from §251(b)(5) calls made to ISPs located within the caller's local calling area."¹⁵ Specifically, the FCC concluded that ISP-bound traffic is "information access" under §251(g), and therefore "excepted from the scope of 'telecommunications' subject to reciprocal compensation under §251(b)(5)."¹⁶

On review in *Worldcom v. FCC*, the D.C. Circuit again remanded the *ISP Remand Order* to the FCC. The Court concluded that the FCC erred in relying upon §251(g) "to 'carve out' from §251(b)(5) calls made to internet service providers ('ISPs') located within the caller's local calling area."¹⁷ Emphasizing that its decision was limited to 251(g), the Court stated:

Having found that §251(g) does not provide a basis for the Commission's action, we make no further determinations. For example, as in *Bell Atlantic*, we do not decide whether handling calls to ISPs constitutes 'telephone exchange service' or 'exchange access' (as those terms are defined in the Act, 47 U.S.C. §§153(16), 153(47)) or neither, or whether those terms cover the universe to which such calls might belong. Nor do we decide the scope of the 'telecommunications' covered by §251(b)(5). Nor do we decide whether the Commission may adopt bill-and-keep for ISP-bound calls pursuant to §251(b)(5); see §252(d)(B)(i) (referring to bill-and-keep). Indeed, these are only samples of the issues we do not decide, which are in fact all issues other than whether §251(g) provided the

that the telecommunications subject to those provisions are all such telecommunications not excluded by section 251(g). In the *Local Competition Order*, as in the subsequent *Declaratory Ruling*, use of the phrase 'local traffic' created unnecessary ambiguities, and we correct that mistake here. *ISP Remand Order* at ¶¶45-46, see also, ¶¶23-31, 54. (Footnotes omitted.)

¹⁵ *WorldCom*, 288 F.3d at 430.

¹⁶ *Id.* at 431. Having removed ISP-bound calls from the scope of §251(b)(5), the FCC established an interim compensation regime including a transition to 'bill and keep,' whereby each carrier recovers its costs from its own end-users. In arriving at this solution, the FCC pointed to a number of flaws in the prevailing intercarrier compensation mechanism for ISP calls, under which the originating LEC paid the LEC that served the ISP. Because ISPs typically generate large volumes of one-way traffic in their direction, the old system attracted LECs that entered the business simply to serve ISPs, making enough money from reciprocal compensation to pay their ISP customers for the privilege of completing the calls.... To smooth the transition to bill-and-keep (but without fully committing itself to it), the FCC adopted several interim cost-recovery rules that sought to limit arbitrage opportunities by lowering the amounts and capping the growth of ISP-related intercarrier payments. These tend to force ISP-serving LECs to recover an increasing portion of their costs from their own subscribers rather than from other LECs. *Id.* at 431-432. See also, *ISP Remand Order* at ¶1.

¹⁷ *Id.* at 430. (Emphasis added.)

authority claimed by the Commission for not applying §251(b)(5).

Moreover, we do not decide petitioners' claims that the interim pricing limits imposed by the Commission are inadequately reasoned. Because we can't yet know the legal basis for the Commission's ultimate rules, or even what those rules may prove to be, we have no meaningful context in which to assess these explicitly transitional measures.

Finally, we do not vacate the order. Many of the petitioners themselves favor bill-and-keep, and 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)).¹⁸

Discussion.

I. As noted above, the Level 3/Qwest ICA provides that the parties shall exchange ISP-bound traffic as that term is used in the FCC's *ISP Remand Order*, pursuant to the rates specified in the *ISP Remand Order*.¹⁹ The parties appear to agree that, until October 18, 2004, at least, no compensation was due for ISP-bound traffic in accordance with Section 7.3.6.3 of the ICA. That provision basically mirrors the "New Markets Rule" adopted in the *ISP Remand Order*.²⁰

On October 18, 2004, the FCC released its *Core Communications Order*, granting forbearance from the New Markets Rule. Level 3 asserts that the practical effect of that Order is to require intercarrier compensation for all ISP-bound traffic, including VNXX-routed ISP-bound traffic, after October 18, 2004, under Section 7.3.6.2.3.4 of the ICA. That provision contemplates payment at \$.0007 per minute of use (MOU).

Qwest apparently concedes that the *Core Communications Order* requires it to pay Level 3 for "local" ISP-bound traffic originated by Qwest customers

¹⁸ *Id.* at 434.

¹⁹ Section 7.3.4.3 provides: "The Parties agree to exchange all EAS/Local (§251(b)(5)) and ISP-bound traffic (as that term is used in the FCC ISP Order) at the FCC ordered rate, pursuant to the FCC ISP Order. The FCC ordered rate for ISP-bound traffic will apply to EAS/Local and ISP-bound traffic in lieu of End Office call termination and Tandem Switched Transport. See Section 7.3.6 of this Agreement for FCC-ordered rates."

Section 7.3.6 of the ICA is entitled 'ISP-Bound Traffic.' Section 7.3.6.1 specifies that 'the Parties shall exchange ISP-bound traffic pursuant to the compensation mechanism set forth in the FCC ISP Order.' Accordingly, the rates set forth in the ICA mirror the interim compensation rates specified in the *ISP Remand Order*.

²⁰ *ISP Remand Order* at ¶81; *Core Communications Order* at ¶24.

and terminated by Level 3 at the \$.0007/MOU compensation rate.²¹ Qwest's objection, and indeed the principal dispute in this proceeding, concerns whether the ICA requires the parties to exchange compensation for VNXX-routed ISP-bound traffic. In accordance with Section 7.3.4.3, the Commission must determine whether the FCC's definition of "ISP-bound traffic" in the *ISP Remand Order* includes VNXX-routed ISP-bound traffic.²²

II. Qwest argues that prior and subsequent history confirm that the *ISP Remand Order* defines ISP-bound traffic to encompass only those situations in which the customer initiating an Internet call, and the ISP equipment to which that call is directed, are located in the same local calling area. It points out that:

- The FCC's description of ISP traffic in the *Declaratory Ruling* states that "[u]nder one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area."²³
- The *ISP Remand Order* contains essentially the same description of ISP traffic, observing that "an ISP's end-user customers typically access the Internet through an ISP server located in the same local calling area."²⁴
- In the *Bell Atlantic* decision, remanding the *Declaratory Ruling* back to the FCC, the D.C. Circuit stated that the issue before the FCC in the *Declaratory Ruling* was "whether calls to internet service providers ('ISPs') within the caller's local calling area are themselves 'local.'"²⁵
- In the *WorldCom* decision, remanding the *ISP Remand Order*, the D.C. Circuit stated that "[i]n the order before us the Federal Communications Commission held that under §251(g) of the Act it was authorized to 'carve out' from §251(b)(5) calls made to internet service providers ('ISPs') located within the caller's local calling area."²⁶

²¹ Qwest Complaint at ¶28; see fn. 6.

²² ALJ Memorandum at 2; Level 3 Brief at 2.

²³ *Declaratory Ruling* at ¶4. (Emphasis added.)

²⁴ *ISP Remand Order* at ¶10. (Emphasis added.) The FCC does not discuss 'atypical' methods of accessing the Internet. Qwest states that the other methods involve making either a 1+ toll call or an "800" service call to access ISP modem banks located outside an end-user's LCA. Qwest Brief at 2.

²⁵ *Bell Atlantic*, 206 F.3d at 2. (Emphasis added.)

²⁶ *Worldcom*, 288 F.3d at 430. (Emphasis added.) The Court also held "[t]he reciprocal compensation requirement of §251(b)(5) . . . is aimed at assuring compensation for the LEC that completes a call originating within the same area." *Id.*

III. Level 3 argues that nothing in the *ISP Remand Order* limits reciprocal compensation payments to traffic exchanged within the same local calling area. It contends that:

[w]hile Qwest relies on background statements in the *ISP Remand Order* that discuss ISPs 'typically' establishing points of presence in the same local calling area, the FCC's decision was in no way dependent upon the geographic location of the ISP. To the contrary, the FCC concluded that ISP-bound traffic was interstate based on its end-to-end analysis of the entire media stream, all the way to the server on which the actual content was located.²⁷

Level 3 also emphasizes that the *ISP Remand Order* expressly repudiates the FCC's earlier rulings limiting §251(b)(5) to local telecommunications. In that Order, the FCC stated that it had erred in focusing on the nature of the service (i.e., local or long distance) in interpreting the relevant scope of §251(b)(5). Moreover, it specifically found that "[o]n its face, local exchange carriers are required to establish reciprocal compensation arrangements for the transport and termination of *all* 'telecommunications' they exchange with another telecommunications carrier, without exception."²⁸ In addition, the FCC stated that "[u]nless subject to further limitation, Section 251(b)(5) would require reciprocal compensation for transport and termination of *all* telecommunications traffic, – i.e., whenever a local exchange carrier exchanges telecommunications traffic with another carrier."²⁹

Level 3 further maintains that *WorldCom* expressly rejects the FCC's conclusion in the *ISP Remand Order* that §251(b)(5) was "subject to further limitation" because certain types of traffic, including ISP-bound traffic were 'carved out' by §251(g). It observes that the Court found that "ISP-bound traffic exchanged between LECs did not constitute 'information access' subject to §251(g), as the FCC had asserted."³⁰ It also stressed that the Court did not "cast any doubt on the [FCC's] express finding that §251(b)(5) applies, 'on its face,' to *all* telecommunications traffic, whether local or otherwise."³¹ In addition, Level 3 observes that the FCC amended its reciprocal compensation rules to eliminate the word "local" and to apply §251(b)(5) to all telecommunications.

²⁷ Level 3 Brief at 6.

²⁸ *ISP Remand Order* at ¶31. (Emphasis in original.)

²⁹ *Id.* at ¶32. (Emphasis in original.)

³⁰ Level 3 Brief at 5.

³¹ *Id.*

IV. For the reasons set forth below, I find that ISP-bound traffic, as defined in the *ISP Remand Order*, does not include VNXX-routed ISP-bound traffic:

(a) Level 3 appears to argue that the FCC's decision to reject the "local v. long distance" dichotomy in the *ISP Remand Order* somehow compels the conclusion that the FCC's definition of ISP-bound traffic includes VNXX-routed ISP-bound traffic. The problem with that argument is that it confuses the FCC's description of how ISP-bound traffic is provisioned with the agency's conclusions regarding how that traffic should be treated for reciprocal compensation and jurisdictional purposes.³² Put another way, the FCC's decision to abandon its attempt to categorize ISP-bound traffic as local or long distance for purposes of determining whether reciprocal compensation is due under §251(b)(5), is unrelated to its longstanding definition of ISP-bound traffic.³³ Beginning with the *Declaratory Ruling* and extending to the *ISP Remand Order*, the FCC has consistently described ISP-bound traffic as "the delivery of calls from one LEC's end-user customer to an ISP in the same local calling area that is served by the competing LEC."³⁴ That definition was adopted by the D.C. Circuit in both the *Bell Atlantic* and *Worldcom* decisions. None of these decisions provide any indication that ISP-bound traffic encompasses VNXX-routed traffic.

(b) Level 3 argues that the descriptions of ISP-bound traffic used by the FCC and the D.C. Circuit are really only "background statements" and were not intended to place a geographical limitation on the placement of ISP servers or modem banks. On the contrary, Level 3 stresses that "the FCC concluded that ISP-bound traffic was interstate based on its end-to-end analysis of the entire media stream...."³⁵ This argument is unconvincing. First, it presumes that both the FCC and the Court chose to describe ISP-bound traffic in a particular manner without intending it to have any specific meaning. Second, it ignores the fact that there are repeated references in both the *Declaratory Ruling* and the *ISP Remand Order* that make clear that the FCC intended that an ISP server or modem bank be located in the same LCA as the end-user customer

³² The Ninth Circuit recognized the distinction "between the jurisdictional analysis of what constitutes 'interstate' or 'intrastate' traffic, and the analysis of what constitutes 'local' or 'interexchange' traffic for the purposes of reciprocal compensation." *Pacific Bell*, 325 F.3d at 1126.

³³ As discussed herein, the FCC has consistently recognized that ISP-bound traffic is initiated by an end-user customer making a seven-digit local call to an ISP server/modem bank located in the same local calling area. Once the call reaches the server/modem bank, the ISP utilizes a variety of computer processing and other functions to enable the caller to access the Internet. It is this understanding of ISP-bound traffic that the FCC had in mind as it endeavored to determine whether ISP-bound traffic is eligible for reciprocal compensation. It is also important to note that, in the proceedings that led to the *Declaratory Ruling*, many CLECs argued that ISP-bound traffic actually involved two calls: the first terminating at the ISP's local server, where a second, packet-switched "call" then commenced. That theory was rejected by the FCC in the *Declaratory Ruling* by applying the end-to-end analysis. The decision to abandon the end-to-end analysis in the *ISP Remand Order* did not, however, alter the FCC's understanding of how ISP-bound traffic is provisioned. See e.g., *ISP Remand Order* at ¶¶ 9-16.

³⁴ *ISP Remand Order* at ¶13.

³⁵ Level 3 Brief at 6.

initiating the call.³⁶ Third, Level 3's argument continues to confuse the FCC's jurisdictional analysis of ISP-bound traffic with the definition of how that traffic is provisioned. The FCC has consistently held that ISP-bound traffic is "predominately interstate for jurisdictional purposes."³⁷ The *ISP Remand Order* did nothing to change that determination. Likewise, the *ISP Remand Order* preserved the FCC's holding in the *Declaratory Ruling*, which defined ISP-bound traffic to require ISP servers or modems to be located in the same LCA as the end-user customer initiating the call.

(c) As noted above, Level 3 reads the *ISP Remand Order* and the *Worldcom* decision to mandate that: (a) the reciprocal compensation requirements of §251(b)(5) apply to *all* telecommunications, and (b) that ISP-bound traffic qualifies as telecommunications. These assertions remain open to question.³⁸ Even if Level 3's interpretation of these decisions is correct, it does not advance its position regarding VNXX traffic. Because VNXX-routed ISP-bound traffic does not fall within the

³⁶ See, e.g., *Declaratory Ruling* at ¶¶4, 7-8, 12, 24 (fn. 77), 27; *ISP Remand Order* at ¶¶10, 13, 24.

³⁷ The FCC emphasized that it has been consistent in its jurisdictional treatment of ISPs. It further emphasized that "[i]nternet service providers are a class of ESPs [Enhanced Service Providers]. Accordingly, the LEC-provided link between an end-user and an ISP is properly characterized as interstate access." *ISP Remand Order* at ¶57. (Emphasis in original.) See e.g., ¶¶52-58 for discussion of the ESP exemption.

³⁸ In *WorldCom*, the D.C. Circuit held:

The reciprocal compensation requirement of §251(b)(5), quoted above, is aimed at assuring compensation for the LEC that completes a call originating within the same area. Although its literal language purports to extend reciprocal compensation to all 'telecommunications,' the [FCC] has construed it as limited to 'local' traffic only. For long distance calls, by contrast, the long-distance carrier collects from the user and pays both LECs – the one originating and the one terminating the call. 288 F.3d at 429. (Citations omitted.)

The D.C. Circuit went on to emphasize that it did not decide "whether handling calls to ISPs constitutes 'telephone exchange service' or 'exchange access'...." Nor did the Court "decide the scope of the 'telecommunications' covered by §251(b)(5)." *Id.* at 434.

Likewise, in *Pacific Bell* (issued subsequent to *WorldCom*), the Ninth Circuit held "[b]ecause the FCC has yet to resolve whether ISP-bound traffic is 'local' within the scope of §251, the CPUC's decision to enforce an arbitration agreement that subjects ISP-bound traffic to reciprocal compensation was not inconsistent with §251." 325 F.3d at 1130.

More recently, in *Qwest Corporation v. Universal Telecom, Inc., et al.*, Civil No. 04-6047-AA (2004), the U.S. District Court for the District of Oregon held that "VNXX traffic does not meet the definition of local traffic because it does not originate and terminate in the same LCA or EAS; it instead crosses LCAs and EASs." It further held that VNXX traffic was not local "whether it was ISP-bound or not." *Universal*, mimeo at 24.

The *Worldcom*, *Pacific Bell*, and *Universal* decisions disclose that there remains considerable uncertainty regarding the future application of "local v. interstate" analysis, as well as the scope of "telecommunications" under §251(b)(5) of the Act.

FCC's definition of ISP-bound traffic, it is irrelevant whether ISP-bound traffic is telecommunications subject to reciprocal compensation.

(d) Level 3 suggests that paragraph 84 of the *ISP Remand Order* supports its position because the FCC made reference to agreements negotiated between CLECs and RBOCs that provided compensation for VNXX traffic. In that paragraph, the FCC explained the reasons why its interim compensation regime included rate caps "to limit carriers' ability to draw revenue from other carriers, rather than from their own customers." The third reason cited by the FCC was "that negotiated reciprocal compensation rates continue to decline as ILECs and CLECs negotiate new interconnection agreements."³⁹ The FCC's discussion, however, makes no mention of VNXX-routed ISP-bound traffic. To argue that a passing reference to "negotiated agreements" somehow expands the FCC's definition of ISP-bound traffic is unreasonable.

(e) Level 3 suggests that the fact that VNXX calls are "locally dialed" is sufficient to bring those calls within the FCC's definition of ISP-bound traffic. Thus, as long as an end-user customer makes a seven-digit call to access an ISP, it is unnecessary to impose a geographical limitation on the location of the ISP's server/modem bank. This is a convenient theory, but it is inconsistent with the characterization of ISP-bound traffic that has been consistently used by the FCC and the D.C. Circuit.

(f) Level 3 next argues that the *Core Communications Order* requires that the definition of ISP-bound traffic include VNXX-routed traffic. It states that "[t]he FCC's retention of the Rate Cap and Mirroring rules and forbearance from the New Markets and Growth Cap rules has made it clear that ISP-bound traffic encompasses traffic that is terminated to an ISP by means of VNXX routing."⁴⁰ It also points out, among other things, that the FCC recognized that the ISP dial-up market has changed, and that it is necessary to promote efficient investment in telecommunications services and facilities.⁴¹ Level 3 stresses that precluding VNXX-routed traffic from ISP-bound traffic will result in unnecessary investment expense, create the need for a separate compensation system, and encourage regulatory arbitrage.⁴²

Despite Level 3's claim, there is nothing in the *Core Communications Order* that even remotely suggests that the FCC intended to expand its definition of ISP-bound traffic to include VNXX-routed traffic.⁴³ Moreover, as Qwest points out, it would

³⁹ See also, *ISP Remand Order* at ¶85.

⁴⁰ Level 3 Brief at 11.

⁴¹ *Id.* at 12.

⁴² *Id.*

⁴³ At most, the FCC decision in *Core Communications* to forbear from the New Market's rule signalled its intention to permit the continued payment of reciprocal compensation for ISP-bound traffic. But, as

be highly unusual for the FCC to invoke a policy that would impact state authority (*i.e.*, regulation of intrastate access charges) without making some mention of that fact.

Level 3's VNXX-related policy arguments are irrelevant to the issue before the Commission. The Commission's task is to interpret the Level 3/Qwest ICA; specifically, whether the term "ISP-bound traffic," as used in the *ISP Remand Order*, encompasses VNXX-routed traffic. That inquiry does not include an evaluation of the parties' competing policy arguments.

(g) Level 3 argues that the legal and factual issues in this case are intertwined and that an ALJ ruling interpreting Section 7.3.4.3 of the ICA is inappropriate at this time. I disagree with that assessment. In my opinion, the relevant FCC and judicial interpretations of ISP-bound traffic are dispositive of this issue.

(h) Because this ruling has a substantial impact upon the interests of the parties, I am automatically certifying it to the Commission. In the final analysis, the interests of both parties are better served by having the agency resolve this matter as soon as possible. That is especially true given the parties have already indicated that the Commission's decision will be appealed no matter who prevails. The sooner the parties obtain final resolution regarding the treatment of VNXX-routed ISP-bound traffic, the sooner they will be able to devote their energies and resources to more productive pursuits.

RULING

For the reasons set forth above, I find that the term "ISP-bound traffic," as used in the *ISP Remand Order*, does not include VNXX-routed ISP-bound traffic. Accordingly, Section 7.3.4.3 of the Level 3/Qwest ICA does not require the exchange of compensation for this traffic.

Objections to this ruling shall be filed with the Commission no later than August 30, 2005. Replies to objections shall be filed with the Commission no later than September 9, 2005.

Dated at Salem, Oregon, this 16th day of August, 2005.

Samuel J. Petrillo
Administrative Law Judge

emphasized in this ruling, that decision has no bearing on this matter because VNXX-routed traffic does not fall within the FCC's definition of ISP-bound traffic, as that term is used in the *ISP Remand Order*.