

traffic”) originated by Qwest customers, as required by the terms of the *Core Forbearance Order* and the Parties’ Interconnection Agreement approved by this Commission. In the *Core Forbearance Order*, the FCC removed two discrete restrictions that had formerly limited the circumstances under which a carrier is required to compensate another carrier for the termination of ISP-bound traffic. Although the *Core Forbearance Order* did not disturb the type of traffic for which compensation is due, Qwest asks this Commission to go beyond the scope of the *Core Forbearance Order* and to re-litigate issues that the FCC left undisturbed. Qwest’s attempt to re-litigate these matters is improper and should be rejected by this Commission.

Level 3 has tried to resolve this dispute and to amend the Parties’ Interconnection Agreement through negotiations with Qwest pursuant to the Agreement’s change in law provision. Qwest does not dispute that, under the FCC’s *ISP Remand Order*³ and *Core Forbearance Order*, it must pay intercarrier compensation to Level 3 for ISP-bound traffic originated by Qwest customers and terminated by Level 3 at the rate of \$0.0007 per minute of use (“MOU”). Qwest claims, however, that the FCC’s compensation regime applies only if the customer initiating the call and the ISP server receiving the call are physically located in the same local calling area, which Qwest refers to as “local ISP-bound traffic.” As explained below, Qwest’s position is inconsistent with federal law, and for this reason, Level 3 is entitled to judgment as a matter of law.

As recognized in the Procedural Order dated September 14, 2005, Level 3 believes that this matter may be resolved as a matter of law. Because there are no disputes as to material facts, through this Brief, Level 3 seeks judgment resolving all issues in its Complaint.⁴

³ *Order On Remand and Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, FCC 01-131, CC Docket Nos. 96-98 & 99-68 (rel. April 27, 2001) (“ISP Remand Order”).

⁴ To date, Level 3 has not requested oral argument in this matter. Given that the ALJ has heard argument on these issues in other matters, Level 3 respectfully requests that the ALJ determine whether oral argument would be beneficial.

II. BACKGROUND – THE PARTIES’ INTERCONNECTION AGREEMENT

Level 3 and Qwest began exchanging ISP-bound traffic in Arizona in September 2000, pursuant to the Parties’ original interconnection agreement. Following an arbitration, the Commission approved the Parties’ current Interconnection Agreement in January 2002. Thereafter, in February 2003, the Commission approved, by operation of law, the Parties’ Internet Service Provider (“ISP”) Bound Traffic Amendment (“ISP Amendment”).

The Agreement, as amended by the ISP Amendment, provides that the Parties will exchange traffic, including ISP-bound traffic, pursuant to the *ISP Remand Order*:

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.⁵

It also incorporates the following rate schedule for ISP-bound traffic as reflected in the *ISP Remand Order*:

- 3.2.3 Rate Caps - Intercarrier compensation for ISP-bound traffic exchanged between Qwest and Level 3 will be billed as follows:
 - 3.2.3.1 \$0.0015 per MOU for six (6) months from June 14, 2001 through December 13, 2001.
 - 3.2.3.2 \$0.001 per MOU for eighteen (18) months from December 14, 2001 through June 13, 2003.
 - 3.2.3.3 \$0.0007 per MOU from June 14, 2003 until thirty six (36) months after the effective date of the FCC ISP Order or

⁵ Verified Complaint at ¶ 34; ISP Amendment at ¶ 2.

until further FCC action on intercarrier compensation, whichever is later.⁶

The Parties further agreed that their Interconnection Agreement would be modified to reflect changes in law, including any change in law relating to the *ISP Remand Order*.⁷

The provisions in this Agreement and this Amendment are based, in large part, on the existing state of the law, rules, regulations and interpretations thereof, as of the date hereof (the Existing Rules). To the extent that the Existing Rules are changed, vacated, dismissed, stayed or modified, then the Agreement and all Amendments and all contracts adopting all or part of the Agreement shall be amended to reflect such modification or change of the Existing Rules. Where the Parties fail to agree upon such an amendment within sixty (60) days from the effective date of the modification or change of the Existing Rules, it shall be resolved in accordance with the Dispute Resolution provision of the Agreement.⁸

After the effective date of the *Core Forbearance Order*, and after written notice to Qwest, Level 3 began to invoice Qwest for all ISP-bound traffic above the market caps, in addition to the traffic below the caps as invoiced prior to the *Order*.⁹ Qwest has not paid these invoices. As of April 30, 2005, these unpaid invoices totaled \$904,672.20, exclusive of late charges.¹⁰

Level 3 also sought to amend the Interconnection Agreement to bring it into compliance with the *Core Forbearance Order*.¹¹ On January 27, 2005, Steve Hansen, Vice President-Carrier Relations for Qwest, responded in writing to Level 3, opening

⁶ Verified Complaint at ¶ 10; Answer and Counterclaim at ¶ 47.

⁷ Verified Complaint at ¶ 11; Answer and Counterclaim at ¶ 47.

⁸ *Id.*

⁹ See Verified Complaint at Exhibit C.

¹⁰ See Verified Complaint at ¶ 31, Exhibit D. As noted in the Verified Complaint, this amount has continued to increase while this matter has been pending. Although Qwest has disputed whether it must pay any of these amounts, it has not disputed the accuracy of these invoices should Level 3 prevail.

¹¹ See Verified Complaint at Exhibit A.

the dispute resolution timeframes.¹² On March 31, 2005, Level 3 delivered to Qwest an amendment to the Parties' Agreement that would implement the *Core Forbearance Order*.¹³ To date, however, more than eleven months after Level 3 served notice upon Qwest to implement the terms of the *Core Forbearance Order*, Level 3 and Qwest have been unable to agree upon an appropriate amendment to the Interconnection Agreement.

III. ARGUMENT

A. Federal Law Requires Qwest to Compensate Level 3 for All Locally Dialed ISP-Bound Traffic at the Rate of \$0.0007 per Minute of Use

Neither the *Core Forbearance Order* nor its precursor, the *ISP Remand Order*, distinguish between "local" and "non-local" ISP bound calls. There are no disputed issues of fact that would change the answer to the legal question presented.

Accordingly, Level 3 is entitled to judgment as a matter of law.

On October 8, 2004, the FCC adopted its *Core Forbearance Order*. In that order, effective as of the adoption date, the FCC declined to enforce – and thereby eliminated – the growth caps and new market rules that it had adopted as part of its *ISP Remand Order*.¹⁴ Qwest admits that, under the FCC's *ISP Remand Order* and *Core Forbearance Order*, it must pay intercarrier compensation to Level 3 for locally dialed ISP-bound traffic originated by Qwest customers and terminated by Level 3 at the rate of \$0.0007 per minute of use. The issue raised by Qwest – whether the federal reciprocal compensation regime for ISP-bound traffic applies to VNXX ISP-bound traffic ("VNXX")¹⁵ – is purely a matter of law.¹⁶ Qwest's position on this issue,

¹² See Verified Complaint at Exhibit B.

¹³ A copy of the March 31, 2005 letter from Andrea Gavalas, Vice President of Interconnection Services to Dan Hult of Qwest, which included the proposed amendment, was attached to the Verified Complaint as Exhibit C.

¹⁴ See *Core Forbearance Order* at ¶ 1. The FCC, however, continued to enforce the rate caps for established ISP-bound traffic and the "mirroring" rule.

¹⁵ Under ISP-bound VNXX dialing arrangements, a carrier utilizes an NPA/NXX dialing combination for the delivery of ISP-bound calls to a local service area within the LATA that the carrier has established its point of interconnection with the ILEC, but in which originating local calling area the ISP lacks what Qwest argues is a "physical presence".

however, is inconsistent with current law. Reciprocal compensation under the *ISP Remand Order* and *Core Forbearance Order* applies to all locally dialed ISP-bound traffic regardless of the location of the ISP server to which that call is directed. The *Core Forbearance Order* simply removed an artificial cap that restricted the number of MOUs for which Level 3 could be compensated for the transport and termination of Qwest's originated traffic.

1. **The ISP Remand Order Applies to All ISP-bound Traffic, Including VNXX ISP-bound Traffic**

The *ISP Remand Order* does not limit Qwest's obligation to pay reciprocal compensation for ISP-bound traffic to "local" traffic (where the customer initiating the Internet call and the ISP server receiving the call are physically located in the same local calling area). Qwest, without offering any new facts or legal decisions, asks the Commission to abandon the statutory analysis of Sections 251(b)(5) and 251(g) adopted in the *ISP Remand Order*, and to adopt a view rejected by the FCC in the *ISP Remand Order* – that Section 251(b)(5) applies only to "local" telecommunications traffic.

The *ISP Remand Order* applies to all ISP-bound traffic, regardless of the geographic location of the ISP server to which the call is directed. The FCC's reasons for rejecting the "local"/"long distance" distinction in this context remain valid. Most importantly, the express language of Section 251(b)(5) applies to *all* telecommunications traffic, not just "local" telecommunications traffic. Qwest's position is not supported by the express terms of the *ISP Remand Order*, the Communications Act, or the regulations promulgated in response.

2. **History of the ISP Remand Order**

In its 1996 *Local Competition Order*, the FCC found that Section 251(b)(5)

¹⁶ This case only concerns compensation for the termination of dial up Internet traffic. DSL and other form of broadband Internet connectivity are not implicated (nor is Voice Over Internet Protocol, which requires a broadband connection).

applies only to local telecommunications traffic.¹⁷ The FCC applied that rule to ISP-bound traffic in its *ISP Declaratory Ruling*, which relied on the traditional “end-to-end” jurisdictional analysis to conclude that ISP-bound traffic is not “local” because “a substantial portion of Internet traffic involves accessing interstate or foreign websites.”¹⁸ The D.C. Circuit reversed and remanded that decision saying that the FCC had failed to “provide an explanation why this [end-to-end jurisdictional analysis] is relevant to discerning whether a call to an ISP” should, for intercarrier compensation purposes, “fit within the local call model of two collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs.”¹⁹

In the resulting *ISP Remand Order*, the FCC reconsidered whether Section 251(b)(5), by its terms, applies to ISP-bound communications.²⁰ The FCC repudiated its earlier ruling, namely that the application of Section 251(b)(5) is limited to the termination of “local” telecommunications, finding that it had “erred in focusing on the nature of the service (*i.e.*, local or long distance) . . . for purposes of interpreting the relevant scope of section 251(b)(5),” rather than looking to the language of the statute itself.²¹ Specifically, the FCC found that, “[o]n its face,” Section 251(b)(5) requires “local exchange carriers . . . to establish reciprocal compensation arrangements for the transport and termination of *all* ‘telecommunications’ they exchange with another telecommunications carrier, without exception.”²² The FCC emphasized 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

¹⁷ See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16013 (¶ 1034) (1996); see also *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, 14 FCC Rcd 3689, 3693 (¶ 7) (1999) (“*ISP Declaratory Ruling*”).

¹⁸ See *ISP Declaratory Ruling* at ¶ 1; see also *Bell Atlantic v. FCC*, 206 F.3d 1, 2 (D.C. Cir. 2000).

¹⁹ *Bell Atlantic*, 206 F.3d at 5.

²⁰ See *ISP Remand Order* at ¶ 1.

²¹ *Id.* at ¶ 26.

²² *Id.* at ¶ 31 (emphasis in original).

exchange carrier exchanges telecommunications traffic with another carrier.”²³

The FCC went on to find that Section 251(b)(5) is “subject to further limitation”—specifically, that certain types of traffic enumerated in Section 251(g) are “carve[d]-out” of Section 251(b)(5).²⁴ That conclusion did not, however, affect the FCC’s determination as to the scope of Section 251(b)(5) absent the “limitation” that the FCC believed to be imposed by Section 251(g).

Following the *ISP Remand Order*, the D.C. Circuit Court rejected the FCC’s view that Section 251(g) contains a “limitation” on Section 251(b)(5) with respect to ISP-bound traffic.²⁵ The court found that Section 251(g) permits only “continued enforcement” of pre-1996 Act requirements, rather than conferring independent authority on the FCC to adopt new intercarrier compensation rules inconsistent with Section 251(b)(5). The court further found that there were no pre-1996 Act rules for ISP-bound traffic that Section 251(g) could possibly prescribe, and that, therefore, ISP-bound traffic exchanged between LECs did not constitute “information access” traffic subject to Section 251(g), as the FCC had asserted.²⁶ The D.C. Circuit Court did *not*, however, cast any doubt on the FCC’s express finding that Section 251(b)(5) applies “on its face” to *all* telecommunications traffic, whether local or otherwise. Indeed, in deciding not to vacate the FCC’s order, the D.C. Circuit Court found that there was a non-trivial likelihood that the FCC could adopt its rules pursuant to Section 251(b)(5). Accordingly, Qwest’s claim that the *ISP Remand Order* applies only to “local” traffic is incorrect and inconsistent with the history of the *ISP Remand Order*.

Further, the terms “originate” and “terminate” in Sections 251(b)(5) and 252(d)(2) do not exclude traffic delivered to non-local end-points. Although Qwest attempts to limit Sections 251 and 252 to calls placed to an ISP server physically

²³ *Id.* at ¶ 32 (emphasis in original).

²⁴ *Id.* at ¶ 38.

²⁵ *WorldCom v. FCC*, 288 F.3d 429, 433-34 (D.C. Cir. 2002), *cert. den.* 538 U.S. 1012 (2003).

²⁶ *Id.*

located within the same local calling area as the caller, by their plain terms, Sections 251 and 252 contain no such geographic limitation on the scope of calls. They refer simply to the “transport and termination of telecommunications” and the “transport and termination...of calls.”²⁷ Congress chose the broad term “telecommunications” over the much narrower term “telephone exchange service” to describe the scope of the LECs’ termination obligations under Section 251(b)(5).

Nothing in the *ISP Remand Order* limits reciprocal compensation payments to traffic exchanged within the same calling area. Indeed, while 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.²⁸

3. The FCC’s Rules Also Rejected Any Distinction Between “Local” and “Non-local” ISP-bound Traffic

The rule changes adopted by the FCC in response to the *ISP Remand Order* demonstrate the FCC’s repudiation of its earlier view that Section 251(b)(5) applies only to “local” termination of telecommunications. In the *ISP Remand Order*, the FCC amended its reciprocal compensation rules (47 C.F.R. Part 51, Subpart H) in two key respects. First, it eliminated the word “local” in each place it appeared. This is consistent with the FCC’s confession that it had erred when it had previously interpreted Section 251(b)(5) to apply to “local” traffic only.²⁹ Second, in so doing, the FCC expanded the scope of “telecommunications traffic” under the reciprocal compensation

²⁷ 47 U.S.C. §§ 251(b)(5), 252(d)(2)(A)(i).

²⁸ See *ISP Remand Order* at ¶¶ 77-88. In its *ISP Remand Order*, the FCC found that a number of CLECs had negotiated interconnection agreements with RBOCs that reduced the compensation rate for ISP-bound traffic when it adopted the new rate structure. See *ISP Remand Order* at ¶ 84. Each of those agreements cited by the FCC, including Level 3’s agreements with Verizon and SBC, provided for the payment of compensation for VNXX ISP-bound traffic.

²⁹ See *id.* at ¶ 26.

rules to cover *all* “telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider” except for traffic “that is interstate or intrastate exchange access, information access, or exchange services for such access,” which are the specific categories of traffic enumerated in Section 251(g). And, as discussed above, the D.C. Circuit rejected the FCC’s argument that ISP-bound traffic was information access excluded from Section 251(b)(5) by operation of Section 251(g).

4. The ISP Remand Order Applies to All ISP-bound Traffic

Qwest contends that the FCC’s *ISP Remand Order* applies only to traffic delivered to ISP servers physically located within the same local calling area as the called party. However, as explained above, this assertion is contradicted by the express terms of the *ISP Remand Order*.³⁰ The FCC repudiated its earlier ruling from the *Local Competition Order* that the provision is limited to the termination of “local” telecommunications. In *WorldCom*, the D.C. Circuit Court clarified that ISP-bound traffic does not fall within Section 251(g) because there are no pre-1996 Act rules that Section 251(g) could possibly preserve. This same analysis is equally applicable to traffic bound for an ISP, for which there is also no pre-1996 Act rule governing the exchange of traffic between LECs. Accordingly, the ILECs’ claim that ISP-bound traffic that does not originate and terminate within the same local calling area falls outside the scope of Section 251(b)(5) is inconsistent with both the *ISP Remand Order* and judicial interpretations of the 1996 Act.

In addition, the D.C. Circuit Court’s decision in *Bell Atlantic v. FCC* rejected the end-to-end analysis of ISP-bound traffic upon which Qwest relies to argue that VNXX ISP-bound calls should be subject to access charges and not reciprocal compensation.³¹

³⁰ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-96 and 99-68, Sections 251(b)(5) and Section 252(d)(2) Govern ISP-Bound Traffic and Are Not Limited to “Local” Termination (*ex parte* submission of Level 3 Communications, LLC) (filed June 23, 2004).

³¹ *Bell Atlantic*, 206 F.3d at 4-9.

As the D.C. Circuit Court explained, the end-to-end analysis is used to determine the *jurisdiction* of a call, not the compensation that is due. Thus, when the FCC relied on the “end-to-end” analysis to determine that ISP-bound traffic is not “local,” the D.C. Circuit reversed and remanded the decision. On remand, the FCC eschewed the end-to-end analysis as relevant to determine the appropriate compensation model; instead, it carved out certain types of traffic, such as ISP-bound traffic, from the reciprocal compensation provisions of Section 251(b)(5) by virtue of Section 251(g). As a result, with the repudiation of the end-to-end analysis in respect to ISP-bound traffic, Qwest cannot rely on the end-to-end analysis to determine which form of intercarrier compensation (access or non-access) should apply to VNXX traffic bound for an ISP.

The federal district court in Connecticut,³² rejected the very argument that Qwest advances here. In that case, Southern New England Telephone argued, as Qwest does, that the *ISP Remand Order* does not cover all ISP-bound traffic, but rather, covered only “local” ISP-bound traffic.³³ Applying reasoning that applies with equal force in this case, the court stated:

I start by noting that in the *ISP Remand Order*, the FCC did not use the term “local ISP-bound” traffic and did not impose any explicit restriction on the term “ISP-bound traffic.” Moreover, . . . the FCC expressly disavowed the use of the term “local,” making it difficult to believe the Commission nevertheless, intended that term to be implicitly read back into its ruling. *ISP Remand Order* at 34 (“We also refrain from generically describing traffic as “local” traffic because the term “local,” not being a statutorily defined category, is particularly susceptible to varying meaning and, significantly, is not a term used in section 251(b)(5) or section 251(g).”) Put simply, the language of the *ISP Remand Order* is unambiguous – the FCC concluded that section 201 gave it jurisdiction over all ISP-bound traffic, and it proceeded to set the intercarrier compensation rates for such traffic.³⁴

³² *Southern New England Telephone Company v. MCI WorldCom Communications, Inc.* (“SNET”) 359 F. Supp.2d 229 (D. Conn. 2005).

³³ *Id.* at 230.

³⁴ 359 F. Supp.2d at 231.

5. The Core Forbearance Order Simply Makes More Minutes of Use Compensable

The *Core Forbearance Order* did not change the FCC's regime requiring compensation for all ISP-bound traffic at the rate of \$0.0007. The *Core Forbearance Order*, by lifting the restrictions of the growth caps and new market restrictions, simply increased the number of minutes of use for which carriers should be compensated for terminating ISP-bound traffic.

The *Core Forbearance Order* reaffirms that a CLEC using local dialing patterns for ISP-bound traffic is entitled to receive intercarrier compensation for terminating such ISP-bound traffic. In affirming the goal of establishing efficient network investment signals, the FCC does not set forth a requirement for a CLEC to establish a local presence in order to receive intercarrier compensation for ISP-bound traffic. Rather, the focus is on cost equivalency—with the statement that because delivery costs between ISP-bound traffic and local voice traffic are equivalent, CLECs are entitled to receive intercarrier compensation for transport and termination of ISP-bound traffic on the terminating side on its side of the POI.³⁵ It is important to note that the FCC did not state that ISP-bound traffic should be compensated in the same manner as local voice traffic. Instead, the FCC retained the functional and jurisdictional distinction between ISP-bound traffic and local voice traffic, while adhering to the goal of uniform intercarrier compensation (*i.e.*, that transport and termination of ISP-bound traffic and local voice traffic be compensated at the same rate).³⁶

To exclude VNXX from the definition of ISP-bound traffic would require significant and unnecessary incremental network investment expense and two separate compensation constructs for the same type of traffic. If VNXX were not included

³⁵ *Core Forbearance Order* at ¶ 24

³⁶ *Id.*

within the definition of ISP-bound traffic, the resulting two-tiered compensation approach would undercut both the principle of efficient network architecture and investment and the goal of a uniform intercarrier compensation framework. A two-tiered compensation scheme contradicts the FCC's stated goals in the *Core Forbearance Order*.

B. The Plain Language of the Parties' Interconnection Agreement Requires Compensation for All ISP-Bound Traffic.

The Interconnection Agreement, as amended by the ISP Amendment, provides for reciprocal compensation for ISP-bound traffic to be paid as provided by the *ISP Remand Order*. Given this, one might expect the Agreement to reflect the distinction that Qwest relies on here between "local" and "non local" ISP bound traffic if it were the case that such a distinction exists under the *ISP Remand Order*. In fact, the Agreement draws no such distinction. To the contrary, under the Agreement, all ISP-bound traffic is "created equal." The ISP Amendment states, "The Parties shall exchange ISP-bound traffic pursuant to the compensation mechanism set forth in the FCC ISP [Remand] Order."³⁷ The Agreement does not state that some ISP-bound traffic will be subject to the *ISP Remand Order's* compensation mechanism while other ISP-bound traffic will not.

The Interconnection Agreement provides a mechanism for determining when traffic is ISP-bound traffic. Under that mechanism, when traffic terminated to Level 3 customers exceeds traffic originated by Level 3 customers by a ratio of more than three to one, Qwest is permitted to presume that the traffic is ISP-bound traffic, with

³⁷ ISP Amendment at ¶ 2.

compensation to be paid under the rules that are specific to compensation for termination of ISP-bound traffic.³⁸ Thus, any time the ratio of terminating to originating traffic exceeds three to one, the traffic is treated as ISP-bound traffic for purposes of compensation, subject to a CLEC being able to rebut this presumption. For purposes of determining the applicability of the compensation rules, the only relevant question is whether the traffic is or is not ISP-bound traffic. There is no further subcategory for “non local” ISP-bound traffic to which yet another compensation mechanism is to apply.

Qwest has apparently recognized that the Interconnection Agreement does not distinguish between “local” and “non local” ISP-bound traffic, because it has, under the guise of bringing the Interconnection Agreement into compliance with the *Core Forbearance Order*, proposed an amendment to do just that. Qwest has, with its proposed amendment, sought to “carve out” VNXX traffic from the compensation rules that would otherwise apply.³⁹ Presumably, if it were the case that the Interconnection Agreement (and, by logical extension, the *ISP Remand Order*) already created an exception for VNXX traffic, there would be no need for these provisions. In seeking to amend the Interconnection Agreement to exclude VNXX traffic, Qwest tacitly admits that the Agreement does not include such an exclusion.

C. The Commission’s Order in the AT&T Arbitration Is Not Controlling

Qwest claims that this Commission’s Order in the AT&T/Qwest Arbitration resolves the Parties’ dispute. In that case, however, AT&T and Qwest only sought the Commission’s determination as to the proper definition of “Exchange Service.” Neither party sought to arbitrate or address intercarrier compensation for VNXX services. In

³⁸ *Id.* at ¶ 3.

³⁹ *See Answer and Counterclaim at Exhibit F, Att.1, Sections 1.3 and 1.4.*

addition, the parties did not seek to address the appropriate compensation for ISP-bound traffic. Because of the narrow scope of the Commission's review in that matter, the Commission should not read that decision as determinative in this matter.

In fact, with regard to VNXX issues, the Commission expressed extreme reluctance to decide "a future dispute concerning treatment of AT&T's VNXX service which may or may not arise under that provision."⁴⁰ With regard to that issue, the Commission invited AT&T to file a complaint if it felt that Qwest was acting "discriminatorily or otherwise unlawfully."⁴¹ Indeed, the Commission invited the exact type of complaint brought by Level 3 in this matter.

D. Qwest's Counterclaims Are Without Merit and Should be Dismissed

1. Level 3 Has Complied With the Change in Law Provision of the Parties' Interconnection Agreement

In its counterclaims, Qwest asserts that Level 3 has violated Section 2.2⁴² of the Parties' Interconnection Agreement by invoicing Qwest for the transport and termination of Qwest-originated VNXX ISP-bound traffic, rather than negotiating an amendment to the Agreement to reflect the *Core Forbearance Order*.

With respect to this counterclaim, there is no disputed issue of material fact. Both Level 3 and Qwest agree that an amendment to the Interconnection Agreement is necessary to reflect the FCC's decision in the *Core Forbearance Order*. The Parties have been unsuccessful in negotiating such an amendment. Qwest claims that it presented a proposed amendment that complied with the order, "but Level 3 has rejected it."⁴³ As explained above, Qwest's proposal runs directly contrary to the law. Level 3 presented an amendment that conforms with the law to Qwest, but Qwest rejected Level 3's proposal. Accordingly, Level 3 has continued to invoice Qwest in accordance with

⁴⁰ See Decision No. 66888 at 13.

⁴¹ *Id.*

⁴² The ISP Amendment also contains a similar change in law provision. See ISP Amendment at ¶ 5.

⁴³ Answer and Counterclaim, at ¶ 64.

the *Core Forbearance Order* in order to perfect and maintain its claim.

Given this failure to agree, Section 2.2 provides that the Parties should resolve the issue pursuant to the dispute resolution provisions of the Agreement. Section 5.12 governs dispute resolution and allows either party to seek resolution of a dispute before this Commission.⁴⁴ That is exactly what Level 3 has done by filing its Complaint. Accordingly, Level 3 has not violated Section 2.2 of the Interconnection Agreement and is entitled to judgment as a matter of law.

2. Level 3 Has Complied With Section 13.4 of the Parties' Interconnection Agreement

Qwest alleges that Level 3 is violating Section 13.4 of the Interconnection Agreement by “misassigning local telephone numbers to ISP Servers which are physically located outside the local area to which the telephone number is assigned.”

Section 13.4 states:

Each Party is responsible for administering NXX codes assigned to it. Each Party is responsible for updating the LERG data for NXX codes assigned to its switches. Each Party shall use the LERG published by Bellcore or its successor for obtaining routing information and shall provide through an authorized LERG input agent, all required information regarding its network for maintaining the LERG in a timely manner.

Qwest claims that Level 3 is violating Section 13.4 of the Interconnection Agreement by assigning NXX codes to ISP servers that are not physically located inside the local area to which that telephone number is assigned, despite the fact that this is no different than what Qwest does in offering its wholesale dial-up and FX services.⁴⁵

Moreover, Qwest fails to provide any facts to explain how Level 3 has violated this section of the Interconnection Agreement. Qwest simply states that “[t]hrough its actions described above, Level 3 is violating these obligations.” However, Qwest

⁴⁴ Interconnection Agreement at § 5.12

⁴⁵ See Qwest's Response to Level 3's Data Request No. 23, attached hereto as Exhibit A.

alleges no facts regarding Level 3's alleged failure to update the LERG data with the NXX codes assigned to its switches or to provide all required information regarding its network and no facts to support the allegation that Level 3 has not properly administered the NXX codes assigned to it. Accordingly, Qwest has failed to state a claim, and Level 3 is entitled to judgment as a matter of law.

3. Level 3 Has Properly Routed Traffic Over LIS Trunks

Qwest alleges that Level 3 has improperly routed VNXX ISP-bound traffic over LIS trunks. Both Parties agree that Qwest has routed ISP-bound traffic from its end users to Level 3 over the LIS trunks established under the Interconnection Agreement between the Parties. The only issue is whether the Interconnection Agreement permits this exchange of traffic, which is a question of law. Inasmuch as Level 3 has exchanged ISP-bound traffic with Qwest over the LIS trunks in the past, any objections that Qwest may have in this regard are ones that must be settled pursuant to the dispute resolution provisions of the Interconnection Agreement.

Qwest claims that the Parties' Interconnection Agreement does not specifically delineate ISP-bound traffic as a type of traffic that the Parties may exchange over LIS trunks. Qwest's argument, however, ignores both the *ISP Remand Order* and this Commission's prior arbitration decision from which the Parties' Interconnection Agreement arose. Fundamental to the FCC's analysis and decision in the *ISP Remand Order* was the acknowledgment that ISP-Bound traffic was being properly exchanged over local interconnection trunks. Nowhere did the FCC question the rights of a CLEC to utilize the local interconnection facilities of an incumbent Local Exchange Carrier such as Qwest. To the contrary, the FCC cited to the fact that ISPs, through the ESP exemption, utilized local facilities in order to gain access to the network.⁴⁶ Level 3, in serving its ISP customers, is merely utilizing the same facilities that Qwest has

⁴⁶ See *ISP Remand Order* at ¶ 45.

traditionally utilized. In fact, in its development of the compensation regime governing ISP-bound traffic, the FCC specifically carved out different treatment for carriers that are not exchanging traffic pursuant to interconnection agreements prior to adoption of the *ISP Remand Order* – an illogical separation if the FCC viewed the exchange of ISP-bound traffic over local interconnection trunks as improper.⁴⁷

In the arbitration decision, this Commission found that ISP-bound traffic is local in nature.⁴⁸ The Commission also determined that ISP-bound traffic should be included in the calculation of relative use of interconnection facilities on Qwest's side of the POI.⁴⁹ As a result, the Parties Interconnection Agreement provided that ISP-bound traffic would be compensated in the same manner as EAS/Local traffic.⁵⁰ Based on the Commission's treatment of ISP-bound traffic, it was not necessary to delineate specifically ISP-bound traffic as traffic that the Parties' could exchange over LIS trunks. The inclusion of ISP-bound traffic in Section 7 of the Interconnection Agreement makes clear that the Parties contemplated that this traffic would be exchanged over LIS trunks. The ISP Amendment provides further support that the Parties intended to treat EAS/Local traffic and *all* ISP-bound traffic in the same manner, including that such traffic would be exchanged over LIS trunks.

Qwest's actions also belie its claim that the exchange of this traffic over LIS trunks is improper. As stated above, however, Qwest and Level 3 have exchanged traffic throughout their operational history in Arizona with the understanding, and the Commission's understanding, that the Parties' Interconnection Agreement provides for routing of all ISP-bound traffic over LIS trunks. If Qwest now chooses to dispute Level 3's rights in this regard, despite prior practice and precedent, then the proper methodology for so doing lies within the context of the dispute resolution provisions of

⁴⁷ See *ISP Remand Order* at ¶ 81

⁴⁸ See Decision No. 63550 at 7-8

⁴⁹ See Decision No. 63550 at 10.

⁵⁰ Interconnection Agreement at § 7.3.4.1.

the Interconnection Agreement.

For these reasons, Qwest's claim is without merit.

E. Level 3's Proposed Amendment to the Interconnection Agreement Accurately Reflects the FCC's Core Forbearance Order, and the Commission Should Require Qwest to Execute the Amendment

In Count II of its Verified Complaint, Level 3 asks the Commission to order Qwest to execute an amendment to the Interconnection Agreement that correctly reflects the *Core Forbearance Order*.⁵¹ The Commission should find, as a matter of law, that the Parties should adopt Level 3's proposal, that Qwest is required to execute the amendment as of the effective date of the *Core Forbearance Order*, and that Qwest must compensate Level 3 accordingly.

There are no disputed issues of fact with regard to Count II. Both Qwest and Level 3 agree that an amendment to the Interconnection Agreement is required in order to reflect the change in law set forth in the FCC's *Core Forbearance Order*. The only issue is one of law—whether Level 3's proposed amendment or Qwest's more accurately reflect the terms of that Order. For the reasons set forth above, Level 3's proposed amendment accurately reflects state and federal law. Accordingly, this Commission should require Qwest to execute this Amendment.

Level 3's proposed amendment has an effective date of October 8, 2004, which was the effective date of the *Core Forbearance Order*. Level 3 is entitled, as a matter of law, to payment of reciprocal compensation for all ISP-bound traffic originated by Qwest's end user customer since that date, including VNXX traffic, at the rate of \$0.0007 per minute of use. To hold otherwise would permit ILECs such as Qwest to avoid any negative financial impacts associated with a change in the law by refusing to negotiate an amendment in a timely manner. This would give all ILECs a perverse incentive to delay negotiation of amendments to reflect changes in the law, which would be inconsistent with the Section 251 of the Act. Therefore, this Commission should

⁵¹ A copy of Level 3's proposed amendment is attached as Exhibit E to the Verified Complaint.

find, as a matter of law, that the Parties should adopt Level 3's proposal, should require Qwest to execute the amendment with the effective date of the *Core Forbearance Order*, and should require Qwest to compensate Level 3 accordingly.

IV. CONCLUSION

For the above reasons, Level 3 is entitled to judgment as a matter of law on the claims raised in its Verified Complaint and all counterclaims raised by Qwest.

RESPECTFULLY SUBMITTED this 30th day of November, 2005.

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-AND-

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Attorneys for Level 3 Communications, LLC

ORIGINAL and fifteen (15) copies
of the foregoing filed
this 30th day of November, 2005, with:

The Arizona Corporation Commission
Utilities Division – Docket Control
1200 W. Washington Street
Phoenix, Arizona 85007

Copy of the foregoing hand-delivered
this 30th day of November, 2005, to:

Christopher C. Kempley, Chief Counsel
Legal Department
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

Ernest G. Johnson, Director
Utilities Division
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

Jane Rodda, Administrative Law Judge
Hearing Divisions
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

COPY of the foregoing mailed this
30th day of November, 2005, to:

Timothy Berg
Theresa Dwyer
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3003 N. Central Avenue
Suite 2600
Phoenix, Arizona 85012

Norman Curtright
Qwest Communications
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11th Floor
Phoenix, Arizona 85012

A handwritten signature in cursive script, reading "Jayne Williams", is written over a solid horizontal line.

EXHIBIT A

Arizona
T-01051B-05-0415, T-03654A-05-0415
L3C 01-023

INTERVENOR: Level 3 Communications, LLC

REQUEST NO: 023

Please state whether Qwest offers any FX-like service, e.g., do you currently offer any service or products to your customers, other than service specifically described as FX, under which a customer can obtain a telephone number with an "NXX" associated with a local calling area that is different from the local calling area in which the customer has a physical presence. "FX-like service" means any product or service under which a customer is assigned a telephone number with an "NXX" that is not associated with the rate center where the customer is physically located. If the answer is yes, please state the name of each such FX-like service and provide a service description (including, but not limited to, tariff pages) for each such service.

RESPONSE:

Qwest objects to this interrogatory on the grounds that it is ambiguous in that it defines the phrase "FX-like" to include services that Qwest would dispute are like FX service. Qwest also objects to this interrogatory on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving these objections, Qwest responds as follows:

Primary Rate Service (PRS-Integrated Services Digital Network) has also been compared to FX-like services. With Primary Rate Service, a customer could create a FX-like PRS by ordering PRS from a distant local calling area and then ordering a DS1 facility to the customer owned premises within that local calling area, where the Customer Provided Equipment would be required to channelize the trunks from the DS1 facility. Qwest does not track whether a customer has combined PRS with a DS1 facility with their own CPE.

Documentation which includes the service descriptions can be found in the Exchange and Network Services tariff for each service.

Respondents: Legal and Larry Brotherson, Qwest Manager