LEWIS AND ROCA LLP LAWYERS

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BEFORE THE ARIZONA CORPORATION COMMISSION

JEFF HATCH-MILLER
Chairman

WILLIAM MUNDELL
Commissioner

MARC SPITZER
Commissioner

MIKE GLEASON
Commissioner

KRISTIN K. MAYES
Commissioner

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LEVEL 3 COMMUNICATIONS, LLC, **Complainant,** **vs.** **QWEST CORPORATION,** **Respondent.**	Docket No. T-03654A-05-0415 T-01051B-05-0415

LEVEL 3'S NOTICE OF FILING OF SUPPLEMENTAL AUTHORITY

Level 3 Communications, LLC ("Level 3") files the following document as a supplemental authority in this matter: Order Accepting Interlocutory Review; Granting, In Part, and Denying, In Part, Level 3 's Petition for Interlocutory Review, *In the Matter of Level 3 Communications, LLC v. Qwest Corporation, Level 3 Communications, LLC's Petition for Enforcement of Interconnection Agreement with Qwest Corporation*, Docket No. UT-053039, Order No. 05, Washington State Utilities and Transportation Commission ("Washington Order"). The Washington Order is attached.

1710781.1

Level 3 believes that the following provisions of the Washington Order have particular relevance to this proceeding and requests that the Commission consider these passages and the entire Order in connection with this Docket:

> *25.* We interpret the ISP Remand Order to apply to all ISP-bound traffic, regardless of the point of origination and termination of the traffic. Under the ISP Remand Order, the FCC created a separate compensation category for all ISP-bound traffic.[21] Under this compensation scheme for ISP-bound traffic, it is irrelevant for purposes of determining compensation whether the traffic is local, toll, or via VNXX arrangements. We reject Qwest's interpretation of the ISP Remand Order as limited to calls between a customer and an ISP modem physically located within the same calling area.

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21 ISP Remand Order, ¶ 77.

29. The above summary of the FCC's discussion in the *ISP Remand Order* demonstrates that the FCC did not intend to limit ISP-bound traffic only to traffic originating and terminating in the same local calling area where the ISP server is located. In describing the nature of Internet-bound traffic in the *ISP Remand Order*, the FCC did not address where an ISP server or modem is located.[32] Our decision is consistent with this Commission's decision in arbitrating a recent agreement between CenturyTel and Level 3,[33] and recent decisions by the District Courts of Connecticut and Vermont.[34] These decisions all find that the *ISP Remand Order* addresses *all* ISP-bound traffic, and that "[t]he FCC did not distinguish traffic between an ISP and its customer in different local calling areas from traffic between an ISP and its customer in the same local calling area."[35]

30. The FCC has established an interim compensation regime for ISP-bound traffic until it determines a different regime for intercarrier compensation.[36] States and carriers must abide by the FCC's interim compensation regime for ISP-bound traffic until the FCC adopts different rules. Thus, Qwest must compensate Level 3 for all ISP-bound traffic, including VNXX traffic, according to the rates, terms and conditions in the parties' interconnection agreement, which adopts the *ISP Remand Order.*

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32 Id., ¶ 58; see also ¶ 61.

33 CenturyTel-Level 3 Arbitration, Seventh Supplemental Order, ¶¶ 7-10.

34 Global Naps, 327 F.Supp.2d at 300; SNET v. MCI, 353 F.Supp.2d at 296-97, 299.

35 Global Naps, 327 F.Supp.2d at 300; see also SNET v. MCI, 353 F.Supp.2d at 299; SNET v. MCI, 359 F.Supp.2d, 230-232; CenturyTel-Level 3 Arbitration, Seventh Supplemental Order, ¶¶ 7-10.

36 ISP Remand Order, ¶ 77.

50. ***Discussion and Decision.*** Consistent with our prior orders on this issue, changes in law are generally not effective under an interconnection agreement until the parties modify their agreements to reflect the change in law, file the agreement with the Commission and the Commission approves the agreement. However, there are circumstances where the FCC has determined a change in law is effective on a certain date regardless of whether the parties have modified their interconnection agreements. For example, in the FCC's *Triennial Review Remand Order*,[40] the FCC required changes in access to unbundled network elements as of March 11, 2006, without requiring carriers to modify their amendments to interconnection agreements to implement the change in law.

51. We find a similar effect in the FCC's decision in the Core *Forbearance Order,* requiring the change in compensation rate as of the effective date of the order, October 8, 2004. In the Order, the FCC provides "Consistent with section 10 of the Act and our rules, the Commission's forbearance decision shall be effective on Friday, October 8, 2004."[41] There is no discussion in the order requiring carriers to implement the decision under change of law provisions in parties' interconnection agreements. We find the FCC intended the *Core Forbearance Order* to have immediate effect, and grant Level 3's petition for interlocutory relief on this issue.

52. Further, we find that Level 3 is not prohibited from *billing* Qwest for the amounts it alleges Qwest owes under the *Core Forbearance Order*, but that Qwest is not obligated under its interconnection agreement to pay the amounts due until the Commission approves an amendment to the parties' agreement. Given our decision above concerning the effective date of the *Core Forbearance Order*, we require Qwest to compensate Level 3 under the *Core Forbearance Order* back to the effective date of the FCC's order. We reject the argument that payment back to the effective date is a retroactive application of rates: We are simply implementing the FCC's intent that the *Core Forbearance Order* apply to all carriers on the effective date of the order. We grant Level 3's petition on this issue, finding Level 3 in compliance with the change of law provisions in its interconnection agreement

53. We agree with Level 3's assertion that the administrative law judge's decision on this issue creates an incentive for ILECs to delay implementing amendments to their interconnection agreements. To deter incentives for delay and encourage prompt compliance with FCC Orders, it is appropriate to require Qwest to pay Level 3 late payment fees, as described in Section 5.4.4.1 of the parties' interconnection agreement filed with the Commission on March 7, 2003, on the amounts owing since October 8, 2004. Qwest must make the

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[40] *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005) [Hereinafter "*Triennial Review Remand Order*"].

[41] *Core Forbearance Order*, ¶ 28.

payments after our approval of an amendment to the parties' agreement consistent with this Order.

58. Upon review, we find Level 3's proposed amendment language appropriate to implement the changes in law as a result of the *Core Forbearance Order*. Level 3's language is limited to the changes to the *ISP Remand Order* identified in the *Core Forbearance Order*, and is consistent with our decisions in this Order. Qwest's language seeks to exclude VNXX traffic from compensation for ISP-bound traffic, contrary to our decision. In addition, Qwest's proposed language improperly seeks to relitigate the issue of how to apply the Relative Use Factor, which we decided in Level 3's favor in the Level 3/Qwest Arbitration Order. We require Qwest and Level 3 to execute Level 3's proposed amendment to the interconnection agreement, and file the agreement with the Commission within 15 days of the effective date of this Order.

RESPECTFULLY SUBMITTED this 13th day of February, 2006.

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-AND-

LEVEL 3 COMMUNICATIONS, INC.
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Attorneys for Level 3 Communications, LLC

ORIGINAL and fifteen (15) copies
of the foregoing filed
this 13th day of February, 2006, with:

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

LEWIS AND ROCA LLP LAWYERS

Copy of the foregoing hand-delivered
this 13th day of February, 2006, to:

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Jayne Williams

[Service Date February 10, 2006]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

LEVEL 3 COMMUNICATIONS, LLC,	)	DOCKET NO. UT-053039
	)	
	)	ORDER NO. 05
Petitioner,	)	
	)	ORDER ACCEPTING
v.	)	INTERLOCUTORY REVIEW;
	)	GRANTING, IN PART, AND
QWEST CORPORATION,	)	DENYING, IN PART, LEVEL 3'S
	)	PETITION FOR
Respondent.	)	INTERLOCUTORY REVIEW.
. . . . .	)	

1 ***Synopsis.*** *This Order reverses portions of the administrative law judge's decision, Order No. 03, requires Qwest to compensate Level 3 for ISP-bound traffic under the Federal Communications Commission's (FCC) Core Forbearance Order as of the effective date of that Order, and approves Level 3's proposed amendment language. This Order also affirms the decision in Order No. 03 that ISP-bound VNXX traffic is compensable under the FCC's ISP Remand Order. As a result, the Order dismisses Qwest's counterclaims contesting the use of VNXX arrangements. The Order finds Qwest's claims about the use of VNXX neither material nor necessary to decide the issue in a petition for enforcement of Level 3's interconnection agreement concerning compensation for ISP-bound VNXX traffic.*

PROCEDURAL BACKGROUND

2 **Nature Of Proceeding.** This proceeding involves a petition filed by Level 3 Communications, LLC (Level 3), seeking enforcement of terms of its interconnection agreement with Qwest Corporation (Qwest) concerning compensation for traffic to Internet service providers (ISPs). Qwest filed counterclaims against Level 3 contesting compensation for ISP-bound traffic and

the propriety of Level 3's use of Virtual NXX, or VNXX, traffic under the parties' interconnection agreement.

3 **Order No. 03 – Order on Motions for Summary Determination.** On August 26, 2005, Judge Rendahl entered Order No. 03 in this proceeding, an order granting certain claims in motions for summary determination filed by Level 3 and Qwest, and denying other claims in their motions.[1] Order No. 03 interpreted the Federal Communication Commission's (FCC) *ISP Remand Order*,[2] and the parties' interconnection agreement, to allow compensation for ISP-bound VNXX traffic, under the compensation scheme established in the FCC's Order. Order No. 03 found the change in compensation for ISP-bound traffic established in the FCC's *Core Forbearance Order*[3] effective following Commission approval of an amendment to the parties' interconnection agreement, and declined to accept either party's proposed amendment language. Order No. 3 also denied, in part, Level 3's motions and Qwest's counterclaims, requiring the parties to develop in a hearing issues of fact and law governing the use of VNXX traffic.

4 **Level 3's Petition for Interlocutory Review.** On September 7, 2005, Level 3 filed with the Commission a Petition for Interlocutory Review, seeking review of portions of the administrative law judge's decision. Qwest filed an answer to Level 3's petition on September 19, 2005.

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[1] On August 23, 2005, Administrative Law Judge Karen M. Caillé entered a recommended decision on similar issues in Docket No. UT-053036, involving an enforcement petition filed by Pac-West Telecomm, Inc. (Pac-West), granting Pac-West's petition.

[2] *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, CC Docket Nos. 96-98, 99-68, FCC 01-131 (rel. April 27, 2001) [Hereinafter "*ISP Remand Order*"].

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

5 **Request for Delay in Ruling on Level 3's Petition.** On September 28, 2005, Level 3 and Qwest requested the Commission defer ruling on Level 3's petition until after November 30, 2005, while the parties engaged in settlement discussions. On December 1, 2005, counsel for Level 3 advised the Commission the parties had not resolved the disputed issues through settlement discussions. Level 3 requested the Commission enter an order on its petition for interlocutory review, and stay the procedural schedule until after the order is entered. On December 8, 2005, the Commission notified the parties it would enter an order on Level 3's petition by February 10, 2006, and stayed the procedural schedule until the Commission entered its order.

6 **Commission Decision.** We accept Level 3's petition for interlocutory review of Order No. 03, granting in part, and denying in part, Level 3's petition. We reverse the administrative law judge's decisions concerning the *Core Forbearance Order*, require Qwest to compensate Level 3 for ISP-bound traffic under the FCC's *Core Forbearance Order* as of the effective date of that Order, with interest, and approve Level 3's proposed amendment language. We also dismiss Qwest's counterclaims concerning the use of VNXX arrangements, finding Qwest's claims about use of VNXX not material or necessary to deciding the issue of compensation for ISP-bound traffic under the FCC's *ISP Remand Order*. Finally, we affirm the finding in Order No. 03 that the Commission has not approved or rejected the use of VNXX arrangements in interconnection agreements, denying Level 3's petition on this issue.

7 **Appearances.** Gregg Strumberger and Victoria Mandell, Regulatory Counsel, Broomfield, Colorado, and Rogelio E. Peña, Peña & Associates, Boulder Colorado, represent Level 3. Lisa A. Anderl, Associate General Counsel, and Adam L. Sherr, Corporate Counsel, Seattle, Washington, and Alex M. Duarte, Corporate Counsel, Portland, Oregon, represent Qwest.

MEMORANDUM

A. Background Information

8 In this proceeding, Level 3 seeks to enforce provisions of its interconnection agreement with Qwest concerning compensation for ISP-bound traffic. Specifically, Level 3 asserts the FCC's *ISP-Remand Order* requires compensation for ISP-bound VNXX traffic. A VNXX traffic arrangement "converts what would otherwise be toll calls into local calls."[4] Level 3 also requests the Commission order Qwest to amend its interconnection agreement with Level 3 to reflect a recent FCC decision governing compensation for ISP-bound traffic, referred to as the *Core Forbearance Order*.

9 In its counterclaims, Qwest asserts VNXX traffic violates federal and state law, as well as provisions of the parties' interconnection agreement. Qwest also seeks to amend the parties' agreement to reflect the *Core Forbearance Order*, excluding compensation for VNXX traffic and applying the Relative Use Factor (RUF) calculation such that Level 3 is responsible for all ISP-bound traffic originated by Qwest end user customers.

10 Order No. 03 in this proceeding interpreted the FCC's *ISP-Remand Order* to allow compensation for ISP-bound VNXX traffic. The decision denied Level 3's requests to order Qwest to amend the parties' agreement to reflect the *Core Forbearance Order*, and to require a change in compensation levels as of October 8, 2004, the effective date of the *Core Forbearance Order*. The Order also deferred

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[4] *Global Naps, Inc. v. Verizon New England Inc.*, 327 F.Supp.2d 290, 295 (D. Vermont, 2004). Ten-digit telephone numbers use the NPA/NXX format, in which the NPA is the area code and the NXX is the 3-digit prefix, or number that identifies the specific telephone company central office serving the line. *Qwest Motion for Summary Determination*, ¶ 19. The NXX code identifies where a call is terminated, and determines whether a caller incurs local or toll charges. VNXX numbers have the same NXX as the local calling area of an end-user customer, but may terminate in a different calling area, local access and transport area (LATA), or state. *Id.*, ¶¶ 4, 23.

Qwest's counterclaims for hearing to develop a more complete record on VNXX traffic, denying in part, and granting in part, Qwest's counterclaims and Level 3's motions concerning Qwest's counterclaims.

11 Level 3 seeks interlocutory review of five specific decisions in Order No. 03. We consider Level 3's request for interlocutory review and claims of error, as well as the issue of compensation for ISP-bound VNXX traffic, in Sections B through H, below.

B. Interlocutory Review.

12 Level 3 seeks interlocutory review of several decisions in Order No. 03, asserting review will save the Commission and the parties substantial effort or expense. Level 3 objects to certain decisions on its motion for summary determination. Level 3 asserts the issues in this proceeding are issues of law and that, contrary to the findings in Order No. 3, there are no issues of fact requiring a hearing. Level 3 asserts the burden of a hearing outweighs the costs and delay of exercising interlocutory review. Level 3 further asserts interlocutory review is appropriate to resolve inconsistencies within Order No. 3, as well as inconsistencies between Order No. 03 in this proceeding and the Recommended Decision in the Pac-West proceeding in Docket No. UT-053036.

13 Qwest argues interlocutory review is not warranted. Qwest asserts that disrupting the schedule imposes greater costs in time and delay than holding a hearing. Qwest asserts preparing for hearing imposes only a slight burden on the parties, i.e., preparing and filing testimony. Qwest asserts similar proceedings are underway in other states, lessening the burden of preparing testimony. Qwest also asserts interlocutory review resolves some of the issues in the proceeding, and Qwest would still request review of the decision in Order No. 3 concerning compensation for ISP-bound traffic. In the event the

Commission accepts interlocutory review and reviews all issues resolved in Order No. 03, Qwest requests permission to supplement its answer concerning whether VNXX traffic is compensable under the FCC's *ISP Remand Order*.

14 ***Discussion and Decision.*** Interlocutory review involves Commission review of interim decisions, i.e., orders that are not dispositive of all the issues in the proceeding. The order at issue in Level 3's petition, Order No. 03, is an interim order resolving the parties' motions for summary judgment, and is not a recommended decision resolving all of the issues presented by the parties.

15 The Commission retains discretion whether to accept interlocutory review of its decisions. *See WAC 480-07-810(2).* Pursuant to WAC 480-07-810(2), the Commission may accept review of interlocutory orders if it finds that:

> (a) The ruling terminates a party's participation in the proceeding and the party's inability to participate thereafter could cause it substantial and irreparable harm;
>
> (b) A review is necessary to prevent substantial prejudice to a party that would not be remediable by post-hearing review; or
>
> (c) A review could save the commission and the parties substantial effort or expense or some other factor is present that outweighs the costs in time and delay of exercising review.

16 We find interlocutory review appropriate under WAC 480-07-810(2)(c) and accept interlocutory review of Order No. 03. Accepting interlocutory review will save the parties and the Commission substantial effort in this proceeding. It is more efficient for the Commission and the parties to address the disputed issues on interlocutory review than to decide the issues after the Commission holds a hearing and the administrative law judge enters a recommended decision. While Qwest focuses solely on the burden of the *parties* in preparing for a hearing, our

rule addresses whether review would save the parties *and the Commission* substantial effort or expense.

17 In addition, we find the contested issues in this proceeding significantly similar to those presented in the Pac-West proceeding in Docket No. UT-053036. Both proceedings concern interpretation of the FCC's *ISP Remand Order* and *Core Forbearance Order*, and compensation for ISP-bound VNXX traffic. Qwest made the same counterclaims concerning VNXX in the two proceedings. Accepting interlocutory review is an appropriate way resolve all the issues in this proceeding simultaneously with the Commission entering a final order in the Pac-West proceeding. We reject Qwest's request for additional briefing on the issue of compensation for VNXX traffic under the *ISP Remand Order*, finding the parties provided sufficient briefing on the issue in their motions for summary determination.

C. Compensation for VNXX Traffic under the *ISP Remand Order*.

18 The primary issues Level 3 raises in its enforcement petition, and which Qwest contests, are legal questions: The definition of ISP-bound traffic and proper compensation for ISP-bound traffic. The parties argued these issues extensively in their motions for summary judgment. We will not repeat the arguments in this Order, as the administrative law judge's decision, Order No. 03, adequately summarizes the arguments.

19 Order No. 03 interprets the parties' interconnection agreement to exchange ISP-bound traffic, and requires compensation for such traffic as required by the FCC's *ISP Remand Order*. *Order No. 03, ¶ 28*. The Order also interpreted the *ISP Remand Order* to require compensation for all ISP-bound traffic, regardless of where an ISP server or modem is located. *Id., ¶ 34*. Thus, the Order required

Qwest to compensate Level 3 under the parties' agreement for ISP-bound VNXX traffic. *Id., ¶ 35.* We affirm these decisions.

20 We provide a brief history and analysis of the FCC's decisions concerning compensation for ISP-bound traffic as support for our decision: The FCC has entered several orders on the issue, which orders have been reviewed by the federal courts. When the FCC first adopted rules implementing the 1996 Telecommunications Act, the FCC determined that reciprocal compensation obligations under Section 251(b)(5) "apply only to traffic that originates and terminates within a local area."[5] The FCC further provided that carriers would be compensated for the costs of interstate or intrastate non-local calls through existing access charges, and that state commissions had authority to identify the geographic areas of a local calling area.[6]

21 The FCC first addressed the nature of reciprocal compensation for ISP-bound traffic in 1999 in its *Declaratory Ruling*.[7] The FCC determined that ISP-bound traffic was interstate in nature and subject to the jurisdiction of the FCC, not states.[8] The FCC further determined that because ISP calls were interstate calls jurisdictionally, they are not local calls subject to the reciprocal compensation obligations of Section 251(b)(5).[9] Because the FCC had not adopted a rule governing intercarrier compensation for ISP-bound traffic, the FCC allowed states to consider the issue in arbitrating agreements among carriers.[10] On appeal, the D.C. Circuit Court of Appeals vacated the decision, finding the FCC

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[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 1034 (1996) [Hereinafter "*First Report and Order*"].
[6] *Id.*, ¶¶ 1034-35.
[7] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-988 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (1999) [Hereinafter "*Declaratory Ruling*"].
[8] *Id.*, ¶¶ 12, 18.
[9] *Id.*, ¶ 26.

had not explained why ISP-bound calls being jurisdictionally interstate was relevant to whether the calls were "local" for purposes of reciprocal compensation.[11]

22 In April 2001, the FCC released its *ISP Remand Order*. In that Order, the FCC determined that Section 251(g) excludes ISP-bound traffic from the reciprocal compensation obligations of Section 251(b)(5), and found that ISP-bound traffic is not subject to reciprocal compensation obligations.[12] The FCC also modified its decision in the *First Report and Order* that only "transport and termination of local traffic" is subject to reciprocal compensation, finding that all telecommunications not excluded by Section 251(g) are subject to reciprocal compensation.[13] The FCC established a separate interim compensation regime for all ISP-bound traffic until the FCC finalizes the structure and rates for a new intercarrier compensation system.[14] The FCC's interim regime includes specific minutes-of-use, or MOU, rates that decline over a three year period, rate caps, growth caps, a requirement that LECs mirror or charge the same rates for ISP-bound traffic as Section 251(b)(5) traffic, and an exception for carriers serving in new markets.[15]

23 In May, 2002, the D.C. Circuit Court of Appeals rejected the FCC's findings that Section 251(g) excluded ISP-bound traffic, and remanded the matter to the FCC.[16] The Court did not vacate the order, finding that "there may well be legal bases for adopting the rules chosen by the Commission for compensation between the originating and the terminating LECs in calls to ISPs."[17]

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[10] *Id.*, ¶¶ 26-27.
[11] *Bell Atlantic Telephone Co. v. FCC*, 206 F.3d 1, 6 (D.C. Cir. 2000)
[12] *ISP Remand Order*, ¶¶ 3, 35.
[13] *Id.*, ¶ 46.
[14] *Id.*, ¶ 77.
[15] *Id.*, ¶¶ 78, 81, 89. The rate applicable to day to minutes of use for ISP-bound traffic is $0.0007 per minute.
[16] *WorldCom, Inc., v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002).
[17] *Id.*

24 Our review of the *ISP Remand Order*, the D.C. Circuit's review of the *ISP Remand Order*, the FCC cases preceding the *ISP Remand Order*, the Commission's orders in the *Level 3/CenturyTel* arbitration,[18] and recent district court decisions in Vermont[19] and Connecticut[20] support the decision in Order No. 03 and our decision today.

25 We interpret the *ISP Remand Order* to apply to all ISP-bound traffic, regardless of the point of origination and termination of the traffic. Under the *ISP Remand Order*, the FCC created a separate compensation category for all ISP-bound traffic.[21] Under this compensation scheme for ISP-bound traffic, it is irrelevant for purposes of determining compensation whether the traffic is local, toll, or via VNXX arrangements. We reject Qwest's interpretation of the *ISP Remand Order* as limited to calls between a customer and an ISP modem physically located within the same calling area.

26 Our review of the FCC's decisions preceding the *ISP Remand Order* reveals an evolution in intercarrier compensation mechanisms for ISP-bound traffic culminating in the interim approach in the *ISP Remand Order* applicable to all types of traffic and interconnection arrangements. In its *Declaratory Ruling*, the FCC used an end-to-end analysis of ISP-bound traffic, finding that ISP-bound traffic is jurisdictionally interstate, as a call terminating to the internet could

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[18] *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc., Pursuant to 47 U.S.C. Section 252*, Fifth Supplemental Order, Arbitrator's Report and Decision, WUTC Docket No. UT-023043, ¶¶ 33-35 (Jan. 2, 2003) [Hereinafter "*CenturyTel-Level 3 Arbitration*"], *affirmed* Seventh Supplemental Order: Affirming Arbitrator's Report and Decision, WUTC Docket No. UT-023043, ¶¶ 7-10 (Feb. 28, 2003).

[19] *Global Naps*, 327 F.Supp.2d at 300.

[20] *Southern New England Tel. Co. v. MCI WorldCom Communications, Inc.*, 353 F.Supp.2d 287, 296-97, 299 (D. Conn. 2005) [Hereinafter "*SNET v. MCI*"], recons. denied, *Southern New England Tel. Co. v. MCI WorldCom Communications, Inc.*, 359 F.Supp.2d 229 (D. Conn. 2005).

[21] *ISP Remand Order*, ¶ 77.

terminate in a different state or country.[22] In describing how ISP customers access the internet, the FCC noted 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 FCC described the historical nature of compensation for local and access, or toll traffic, explaining that it has treated ISP-bound traffic as if it were local through its decisions to exempt Enhanced Service Providers, or ESPs, from payment of interstate access charges and other decisions governing access charges.[24] Qwest relies on this discussion in the *Declaratory Ruling*, describing the historical compensation scheme for local and exchange access traffic, as the basis for its argument that the FCC did not change the historical scheme in the *ISP Remand Order*.

27 After the D.C. Circuit Court vacated the *Declaratory Ruling* in the *Bell Atlantic* decision,[25] the FCC entered the *ISP Remand Order*. As described above, the FCC not only reevaluated the treatment of ISP-bound traffic, but also reconsidered its analysis of reciprocal compensation in the *First Report and Order*. The FCC determined that *all* telecommunications not excluded by Section 251(g) are subject to reciprocal compensation, rejecting the notion that reciprocal compensation is limited to "local" traffic.[26] Although the D.C. Circuit rejected the FCC's findings concerning Section 251(g), the court did not vacate the decision or rules for compensating ISP-bound traffic adopted in the *ISP Remand Order*.[27]

28 In addition, while the FCC described in the *ISP Remand Order* its analysis and decisions reached in the *Declaratory Ruling*, including the discussion of the nature

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[22] *Declaratory Ruling*, ¶¶ 13, 18.
[23] *Id.*, ¶ 4; *see also* ¶ 7.
[24] *Id.*, ¶¶ 5, 23. The FCC considers ISPs a subset of ESPs.
[25] *Bell Atlantic*, 206 F.3d 1.
[26] *ISP Remand Order*, ¶ 46.
[27] *WorldCom*, 288 F.3d at 430.

of ISP-bound traffic,[28] this discussion does not represent the FCC's decision in the *ISP Remand Order*. The FCC describes ISP-bound traffic as "traffic destined for an information service provider," and as "information access" traffic.[29] The FCC defines "'information access' ... to include all access traffic that was routed by a LEC 'to or from' providers of information services, of which ISPs are a subset."[30] The FCC further held that "the definition does not require that the transmission, once handed over to the information service provider, terminate within the same exchange area in which the information service provider first received the access traffic."[31]

29 The above summary of the FCC's discussion in the *ISP Remand Order* demonstrates that the FCC did not intend to limit ISP-bound traffic only to traffic originating and terminating in the same local calling area where the ISP server is located. In describing the nature of Internet-bound traffic in the *ISP Remand Order*, the FCC did not address where an ISP server or modem is located.[32] Our decision is consistent with this Commission's decision in arbitrating a recent agreement between CenturyTel and Level 3,[33] and recent decisions by the District Courts of Connecticut and Vermont.[34] These decisions all find that the *ISP Remand Order* addresses *all* ISP-bound traffic, and that "[t]he FCC did not distinguish traffic between an ISP and its customer in different local calling areas from traffic between an ISP and its customer in the same local calling area."[35]

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[28] *ISP Remand Order*, ¶¶ 9-13.
[29] *Id.*, ¶ 44.
[30] *Id.*
[31] *Id.*, n.82.
[32] *Id.*, ¶ 58; *see also* ¶ 61.
[33] *CenturyTel-Level 3 Arbitration*, Seventh Supplemental Order, ¶¶ 7-10.
[34] *Global Naps*, 327 F.Supp.2d at 300; *SNET v. MCI*, 353 F.Supp.2d at 296-97, 299.
[35] *Global Naps*, 327 F.Supp.2d at 300; *see also SNET v. MCI*, 353 F.Supp.2d at 299; *SNET v. MCI*, 359 F.Supp.2d, 230-232; *CenturyTel-Level 3 Arbitration*, Seventh Supplemental Order, ¶¶ 7-10.

30 The FCC has established an interim compensation regime for ISP-bound traffic until it determines a different regime for intercarrier compensation.[36] States and carriers must abide by the FCC's interim compensation regime for ISP-bound traffic until the FCC adopts different rules. Thus, Qwest must compensate Level 3 for all ISP-bound traffic, including VNXX traffic, according to the rates, terms and conditions in the parties' interconnection agreement, which adopts the *ISP Remand Order.*

D. Approval of VNXX arrangements in Interconnection Agreements.

31 Level 3 asserts the administrative law judge erred, in part, in deciding Qwest's Counterclaim No. 2. In that counterclaim, Qwest alleges Level 3 violated state law by billing Qwest the federal reciprocal compensation rate for all VNXX ISP-bound traffic. Level 3 assigns error to Order No. 03's finding at paragraph 42 that the Commission has "not approved or rejected the use of VNXX arrangements for ISP-bound traffic or any other traffic in interconnection agreements in the state," and to the parallel Conclusion of Law No. 8 at paragraph 76.[37]

32 Level 3 asserts the Commission's prior decision in the Level 3/Century Tel Arbitration proceeding in Docket No. UT-023043 contradicts this decision in Order No. 3. In the arbitration decision, the Commission determined that "ISP-bound calls enabled by virtual NXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements consistent with the FCC's ISP Order on Remand."[38] Level 3 asserts that the Commission approved payment of reciprocal compensation for VNXX ISP-bound traffic in approving an interconnection agreement between Level 3 and

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[36] *ISP Remand Order*, ¶ 77.
[37] *Level 3 Communications LLC v. Qwest Communications*, Docket No. UT-053039, Order No. 03, August 26, 2005, ¶¶ 42, 76.
[38] *CenturyTel-Level 3 Arbitration,* Seventh Supplemental Order, ¶¶ 1, 35.

CenturyTel. Level 3 also asserts the Commission approved Level 3's transport and termination of VNXX traffic in its agreement with Qwest, approved soon after the agreement with CenturyTel.

33 Level 3 also asserts the decision in paragraph 42 of Order No. 03 is inconsistent with the Recommended Decision in the Pac-West proceeding, in which the assigned judge rejected Qwest's counterclaim on the basis of the Level 3 /CenturyTel Arbitration.

34 Qwest asserts the Commission's Level 3/CenturyTel Arbitration Order did not decide the propriety of VNXX traffic, but simply decided the issue of compensation for VNXX ISP-bound traffic. Qwest asserts that the parties disputed only the proper compensation for VNXX traffic, not whether its use under the interconnection agreement was proper. Qwest also asserts the Commission did not approve the use of VNXX routing for ISP-bound traffic in the Level 3/Qwest arbitration, noting that the only issue for decision was whether ISP-bound traffic should be included in the Relative Use Factor.

35 ***Discussion and Decision.*** In our prior decisions approving arbitrated agreements between Level 3 and CenturyTel and Qwest, we have not considered the propriety of VNXX arrangements, but instead focused specifically on compensation for these arrangements. We have understood that Level 3 intended to use VNXX arrangements, but no party in the arbitration proceedings raised the issue of whether these arrangements are appropriate or within the law. We do not find the finding reached in paragraph 42 or Conclusion of Law No. 8 in Order No. 03 in error. We deny Level 3's petition for interlocutory relief on this issue.

E. Qwest's Counterclaim No. 4: Obligation to Administer NXX Codes.

36 Level 3 asserts Order No. 03 erred in denying Level 3's motion on Qwest's Counterclaim No. 4. In its counterclaim, Qwest asserts Level 3 is obligated under Section 13.4 of the parties' interconnection agreement to administering NXX codes, and that use of VNXX arrangements violates this provision of the agreement. In paragraph 44 of the Order, the administrative law judge denied both parties' motions for summary judgment on this counterclaim, finding there were disputed issues of material fact. In the Order, the administrative law judge directed the parties to develop a record on the issue through prefiled testimony and hearing to allow a Commission decision on the issue.

37 Level 3 asserts that no factual issues exist. Level 3 asserts that Section 13.4 of the agreement merely identifies administrative responsibilities for assigning NXX codes and does not address the physical location of ISP servers. Level 3 asserts the industry guidelines Qwest cites do not support Qwest's argument, and are insufficient to preclude summary judgment in favor of Level 3.

38 Qwest requests the Commission deny Level 3's petition on this issue and allow the parties to develop the issues further in hearing. Qwest asserts that there remain factual issues, such as whether industry guidelines should be used to interpret the parties' agreement, and the interpretation of the guidelines. Qwest asserts that the proper use and legality of VNXX arrangements should be addressed in hearing before the Commission enters a decision on its counterclaim.

39 ***Discussion and Decision.*** We grant Level 3's petition for interlocutory relief on this issue, and dismiss Qwest's counterclaims in this proceeding. It is not necessary for us to decide in this proceeding whether VNXX arrangements, generally, are appropriate or within the law. The only material issue in this

proceeding is whether the parties' interconnection agreement requires Qwest to compensate Level 3 for the transport and termination of all ISP-bound traffic originated by Qwest's end user customers, including VNXX traffic. Having resolved this issue above, there is no need to address Qwest's counterclaims.

40 Qwest's counterclaims are beyond the scope of this proceeding, where the issues are the interpretation and enforcement of the interconnection agreement. *WAC 480-07-650*. Qwest has not met its burden to demonstrate breach of provisions in the interconnection agreement. Qwest's counterclaims address the use of VNXX arrangements generally, not the specific issue of compensation for VNXX ISP-bound traffic. Should Qwest wish to pursue the broader issue of VNXX generally, it may file its own complaint about specific carriers and their behavior regarding intercarrier compensation methods.

F. Qwest's Counterclaim No. 5: Authority to Exchange VNXX ISP-bound Traffic on LIS Interconnection Trunks.

41 Level 3 also asserts the administrative law judge erred in Order No. 03 in denying Level 3's motion on Qwest's Counterclaim No. 5. In its counterclaim, Qwest asserts the parties' interconnection agreement does not permit Level 3 to exchange VNXX ISP-bound traffic on local interconnection service (LIS) interconnection trunks. In paragraph 46 of Order No. 03, the administrative law judge granted Level 3's motion on Qwest's claim and denied Qwest's motion. However, the Order also directed the parties to develop a complete record on the issue before deciding whether Level 3 may exchange VNXX traffic over LIS trunks, effectively denying Level 3's motion. Level 3 asserts the administrative law judge's ruling is inconsistent, and in error.

42 Qwest requests the Commission deny Level 3's petition on this issue and allow the parties to develop the issues further in hearing. Qwest asserts that factual issues concerning the routing of VNXX traffic over LIS trunks should be

addressed in hearing before the Commission enters a decision on its counterclaim.

43 ***Discussion and Decision.*** Based on our discussion in Section E above, we grant Level 3's petition on this issue, and dismiss Qwest's counterclaims 1, 2, 4 and 5. There is no need to develop in hearing in this proceeding whether VNXX arrangements are appropriate or within the law. Having resolved above the only material issue in this proceeding – compensation for ISP-bound traffic, there is no need to address Qwest's counterclaims or to address Qwest's claims more fully in hearing.

G. Implementing the Core Forbearance Order.

44 In October, 2004, the FCC entered its *Core Forbearance Order*, in which the FCC chose to forbear from enforcing the growth caps and new market provisions of the *ISP Remand Order*. The FCC, on its own motion, extended the grant of forbearance with respect to those rules to all telecommunications carriers.[39]

45 While Level 3 and Qwest agree that the *Core Forbearance Order* results in a change in law governing compensation for ISP-bound traffic, the parties disagree over how to implement these changes. Level 3 seeks additional compensation for ISP-bound traffic from Qwest back to October 8, 2004, the effective date of the *Core Forbearance Order*, and has billed Qwest for these amounts. Qwest asserts that it may only pay the additional amounts after the Commission approves an amendment to the parties' agreement. Level 3 has proposed language to amend the parties' interconnection agreement to reflect the *Core Forbearance Order*, but Qwest and Level 3 continue to dispute the appropriate language.

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[39] *Core Forbearance Order*, ¶27.

46 In paragraph 52 of Order No. 03, the administrative law judge determined that Level 3 may not bill Qwest for additional compensation for ISP-bound traffic under the *Core Forbearance Order* until the Commission approves an amendment to the parties' interconnection agreement implementing the change in law. Level 3 asserts the administrative law judge erred in finding Level 3 in violation of the change of law provisions of the interconnection agreement by billing Qwest for compensation for ISP-bound traffic back to the effective date of the *Core Forbearance Order*.

47 Level 3 requests the Commission reverse the administrative law judge's decision. Level 3 asserts the decision in Order No. 03 is inconsistent with the parties' interconnection agreement, the Recommended Decision entered in the Pac-West proceeding, and creates a perverse incentive for ILECs to delay negotiating agreements to reflect changes in law. Level 3 asserts it has followed the change of law provisions in the agreement by attempting to negotiate an amendment to the parties' interconnection agreement. Level 3 asserts it has followed the dispute resolution provisions of the agreement by requesting the Commission resolve the issues in this proceeding. Level 3 has billed Qwest for the amounts it believes are due under the *Core Forbearance Order* in order to perfect and maintain its claim to the amounts.

48 Level 3 asserts that the *Core Forbearance Order* merely changes the amount of compensable traffic. Level 3 asserts that the issue is not whether Level 3 is entitled to additional compensation under the *Core Forbearance Order,* but when Qwest's obligation to compensate Level 3 began. Level 3 asserts that the change in compensation under the *Core Forbearance Order* begins as of the effective date of the FCC's order.

49 Qwest asserts the parties have not reached agreement on amendment language, and have not filed language with the Commission. Qwest asserts the

Commission has consistently held that interconnection agreements and changes to agreements are not effective until the agreement has been filed with and approved by the Commission. Qwest further asserts there is nothing in the *Core Forbearance Order* to support the argument that the change in law is retroactive to the effective date of the FCC's order.

50 ***Discussion and Decision.*** Consistent with our prior orders on this issue, changes in law are generally not effective under an interconnection agreement until the parties modify their agreements to reflect the change in law, file the agreement with the Commission and the Commission approves the agreement. However, there are circumstances where the FCC has determined a change in law is effective on a certain date regardless of whether the parties have modified their interconnection agreements. For example, in the FCC's *Triennial Review Remand Order,*[40] the FCC required changes in access to unbundled network elements as of March 11, 2006, without requiring carriers to modify their amendments to interconnection agreements to implement the change in law.

51 We find a similar effect in the FCC's decision in the Core *Forbearance Order,* requiring the change in compensation rate as of the effective date of the order, October 8, 2004. In the Order, the FCC provides "Consistent with section 10 of the Act and our rules, the Commission's forbearance decision shall be effective on Friday, October 8, 2004."[41] There is no discussion in the order requiring carriers to implement the decision under change of law provisions in parties' interconnection agreements. We find the FCC intended the *Core Forbearance Order* to have immediate effect, and grant Level 3's petition for interlocutory relief on this issue.

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[40] *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005) [Hereinafter "*Triennial Review Remand Order*"].
[41] *Core Forbearance Order,* ¶ 28.

52 Further, we find that Level 3 is not prohibited from *billing* Qwest for the amounts it alleges Qwest owes under the *Core Forbearance Order*, but that Qwest is not obligated under its interconnection agreement to pay the amounts due until the Commission approves an amendment to the parties' agreement. Given our decision above concerning the effective date of the *Core Forbearance Order*, we require Qwest to compensate Level 3 under the *Core Forbearance Order* back to the effective date of the FCC's order. We reject the argument that payment back to the effective date is a retroactive application of rates: We are simply implementing the FCC's intent that the *Core Forbearance Order* apply to all carriers on the effective date of the order. We grant Level 3's petition on this issue, finding Level 3 in compliance with the change of law provisions in its interconnection agreement

53 We agree with Level 3's assertion that the administrative law judge's decision on this issue creates an incentive for ILECs to delay implementing amendments to their interconnection agreements. To deter incentives for delay and encourage prompt compliance with FCC Orders, it is appropriate to require Qwest to pay Level 3 late payment fees, as described in Section 5.4.4.1 of the parties' interconnection agreement filed with the Commission on March 7, 2003, on the amounts owing since October 8, 2004. Qwest must make the payments after our approval of an amendment to the parties' agreement consistent with this Order.

H. Approval of Proposed Amendment Language.

54 Level 3 and Qwest agree that the *Core Forbearance Order* results in a change of law, and that they must amend their interconnection agreement to implement the change in law. They disagree, however, about the appropriate amendment language. In paragraph 55 of Order No. 03, the administrative law judge did not recommend approval of either party's language, denied Level 3's motion to

require Qwest to execute Level 3's proposed amendment, and suggested the parties use the decisions in the Order as guidance for further negotiations.

55 Level 3 asserts the administrative law judge erred in denying its motion. Level 3 requests the Commission reverse the administrative law judge's decision and require Qwest to execute Level 3's proposed amendment. Level 3 asserts that Qwest's proposed language is contrary to the Commission's decision in the Level 3/CenturyTel Arbitration Order and the administrative law judge's decision in Order No. 03 governing compensation for ISP-bound traffic. Level 3 asserts that its proposed language, attached to its Motion for Summary Determination as Exhibit B to the Affidavit of Mack Greene, is consistent with these decisions and would accurately implement the *Core Forbearance Order*.

56 Qwest objects to Level 3's proposed amendment as allowing the exchange of VNXX traffic. Qwest asserts that the issue of the propriety of VNXX traffic should be fully litigated before the Commission decides on the appropriate amendment language to implement the *Core Forbearance Order*.

57 **Discussion and Decision.** We grant Level 3's petition for interlocutory relief on this issue, and reverse the decision in paragraph 55 in Order No. 03. Level 3 complied with the dispute resolution provisions in its interconnection agreement with Qwest by filing an enforcement petition with this Commission. Level 3 appropriately sought a Commission decision on the parties' competing amendment language. It is not necessary for Level 3 to initiate an arbitration proceeding for this Commission to resolve a dispute about amendment language.

58 Upon review, we find Level 3's proposed amendment language appropriate to implement the changes in law as a result of the *Core Forbearance Order*. Level 3's language is limited to the changes to the *ISP Remand Order* identified in the *Core*

Forbearance Order, and is consistent with our decisions in this Order. Qwest's language seeks to exclude VNXX traffic from compensation for ISP-bound traffic, contrary to our decision. In addition, Qwest's proposed language improperly seeks to relitigate the issue of how to apply the Relative Use Factor, which we decided in Level 3's favor in the Level 3/Qwest Arbitration Order. We require Qwest and Level 3 to execute Level 3's proposed amendment to the interconnection agreement, and file the agreement with the Commission within 15 days of the effective date of this Order.

FINDINGS OF FACT

59 Having discussed above in detail the documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

60 (1) Qwest Corporation is a Bell operating company within the definition of 47 U.S.C. § 153(4), and incumbent Local Exchange Company, or ILEC, providing local exchange telecommunications service to the public for compensation within the state of Washington.

61 (2) Level 3 Communications, LLC is authorized to operate in the state of Washington as a competitive local exchange carrier.

62 (3) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies

within the state, and to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the Telecommunications Act of 1996.

63 (4) The Commission approved an interconnection agreement between Qwest and Level 3 in March 2003, allowing Level 3 to exchange ISP-bound traffic with Qwest.

64 (5) The interconnection agreement between Qwest and Level 3 provides that the parties will exchange ISP-bound traffic, as that term is used in the FCC's *ISP Remand Order*.

65 (6) The FCC entered its *Core Forbearance Order* in October 2004, changing the effect of certain provisions of the *ISP Remand Order*.

CONCLUSIONS OF LAW

66 Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

67 (1) The Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.

68 (2) The Commission retains discretion whether to accept interlocutory review of its decisions. *See WAC 480-07-810(2).*

69 (3) Accepting interlocutory review will save the parties and the Commission substantial effort in this proceeding compared to addressing the issues after holding a hearing and entering a recommended decision. As the issues in this proceeding are similar to those in the Pac-West proceeding in Docket No. UT-053036, interlocutory review appropriately resolves all issues in the two proceedings simultaneously.

70 (4) The FCC's *ISP Remand Order* applies to all ISP-bound traffic, regardless of the point of origination and termination of the traffic. In the *ISP Remand Order*, the FCC creates a separate compensation category for all ISP-bound traffic, regardless of the nature of the traffic. *ISP Remand Order*, ¶ 77.

71 (5) In decisions approving arbitrated agreements between Level 3 and CenturyTel and Qwest, the Commission has addressed and approved compensation for VNXX arrangements, but has not considered the propriety of these arrangements.

72 (6) Qwest's counterclaims are not appropriate for this proceeding, where the only pertinent and material issues are the interpretation and enforcement of the interconnection agreement, and whether the parties' interconnection agreement requires Qwest to compensate Level 3 for the transport and termination of all ISP-bound traffic originated by Qwest's end user customers, including VNXX traffic.

73 (7) In general, the Commission recognizes that changes in law are generally not effective under an interconnection agreement until carriers modify their agreements to reflect the change in law, file the agreement with the Commission and the Commission approves the agreement. The FCC has made exceptions to this general rule, for example in its *Triennial Review Remand Order*.

74 (8) The FCC intended the *Core Forbearance Order* to have immediate effect, as of the effective date of the Order, October 8, 2004.

75 (9) Given the FCC's decision concerning the effective date of its *Core Forbearance Order*, Qwest must compensate Level 3 under the *Core Forbearance Order* back to the effective date of the FCC's order.

76 (10) It is not necessary for Level 3 to initiate an arbitration proceeding for this Commission to resolve a dispute about amendment language.

77 (11) Level 3's proposed amendment language implements the changes in law as a result of the *Core Forbearance Order*, is limited to the changes to the *ISP Remand Order* identified in the *Core Forbearance Order*, and is consistent with our decisions in this Order.

78 (12) Qwest's proposed amendment language is not consistent with our decision in this Order, and seeks to exclude VNXX traffic from compensation for ISP-bound traffic. Qwest's proposed language also seeks to relitigate the issue of how to apply the Relative Use Factor, an issue resolved in the Level 3/Qwest Arbitration Order in Docket No. UT-023042.

ORDER

THE COMMISSION ORDERS:

79 (1) Level 3 Communications, LLC's, Petition for Interlocutory Review is accepted.

80 (2) Paragraphs 73, 74, 83, and 84 of Order No. 03 in this proceeding, interpreting the FCC's *ISP Remand Order* to address all ISP-bound traffic and establish a compensation regime for all ISP-bound traffic, are affirmed.

81 (3) Issue No. 1 raised in Level 3 Communications, LLC's, Petition for Interlocutory Review, assigning error to the finding in paragraph 42 and Conclusion of Law No. 8 in paragraph 76 in Order No. 03 that "the Commission has not approved or rejected the use of VNXX arrangements or other traffic in interconnection agreements in the state," is denied.

82 (4) Issue No. 2 raised in Level 3 Communications, LLC's, Petition for Interlocutory Review, assigning error to the decision in paragraph 52 of Order No. 03 prohibiting Level 3 Communications, LLC, from billing Qwest Corporation for amounts allegedly owed under the FCC's *Core Forbearance Order* , is granted.

83 (5) Issue No. 3 raised in Level 3 Communications, LLC's, Petition for Interlocutory Review, assigning error to the decision in paragraph 55 of Order No. 03 to deny Level 3 Communications, LLC's, motion seeking approval of its proposed amendment language, is granted.

84 (6) Issue Nos. 4 and 5 raised in Level 3 Communications, LLC's, Petition for Interlocutory Review, assigning error to decisions in paragraphs 44 and 46 of Order No. 03 to deny Level 3 Communications, LLC's, motion for summary judgment on Qwest counterclaims asserting breach of the parties' interconnection through the use of VNXX arrangements, is granted.

85 (7) Upon the Commission's approval of an amendment to the parties' agreement consistent with this Order, Qwest Corporation must pay Level 3 Communications, LLC, late payment fees, as described in Section 5.4.4.1 of the March 7, 2003, interconnection agreement between Level 3 Communications, LLC, and Qwest Corporation, on the amounts owing since October 8, 2004, under the *Core Forbearance Order*.

86 (8) Level 3 Communications, LLC, and Qwest Corporation must file with the Commission within 15 business days after the effective date of this Order an amendment to their interconnection agreement complying with the provisions of this Order.

Dated at Olympia, Washington, and effective this 10th day of February, 2006.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.