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BEFORE THE RECEIVED ARIZONA CORPORATION COMMISSION

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JEFF HATCH-MILLER 2006 JUL 31 P 3: 33  
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Arizona Corporation Commission  
**DOCKETED**  
JUL 31 2006

DOCKETED BY  
*nr*

IN THE MATTER OF THE FORMAL  
COMPLAINT OF PAC-WEST TELECOMM  
SEEKING ENFORCEMENT OF THE  
INTERCONNECTION AGREEMENT  
BETWEEN PAC-WEST TELECOMM AND  
QWEST CORPORATION

DOCKET NOS. T-01051B-05-0495  
T-03693A-05-0495

**NOTICE OF FILING  
SUPPLEMENTAL AUTHORITY IN  
SUPPORT OF QWEST  
CORPORATION'S APPLICATION  
FOR REHEARING AND  
MODIFICATION OF ORDER**

Qwest Corporation ("Qwest") hereby submits this Notice of Filing of Supplemental Authority In Support of Qwest Corporation's Application for Rehearing and Modification of Order in the above-captioned docket. Attached hereto as Exhibit I is a copy of the Order on Reconsideration, *In Re: Level 3 Communications, LLC, vs. Qwest Corporation*, Docket No. ARB-05-4 (Iowa Utilities Board, July 19, 2006) ("*Iowa Order*").

***The Iowa Order***

In Qwest's Application for Rehearing, Qwest argues that the Commission erred in concluding that the meaning of the *ISP Remand Order* is inconclusive and unsettled. Qwest demonstrates that four federal circuit court decisions have uniformly concluded that the scope of

1 the *ISP Remand Order* is limited to calls made to ISPs located within the caller's local calling  
2 area. Accordingly, because the ICA amendment's only purpose was to implement the *ISP*  
3 *Remand Order*, the amendment, as a matter of law, does not require Qwest to pay PacWest for  
4 terminating ISP traffic routed over VNXX. On the same day that Qwest filed its Application for  
5 Rehearing in this matter, the Iowa Utilities Board ("Iowa Board") issued the *Iowa Order*,  
6 agreeing with Qwest's position on the scope of the *ISP Remand Order*.

7  
8 The *Iowa Order* finds as follows:

9  
10 "[B]ecause VNXX service effectively results in a CLEC (like Level 3)  
11 using Qwest's network to carry calls from one exchange to another for free, the  
12 Board was concerned with the intercarrier compensation aspects of the service,  
13 that is, that Qwest should not be required to carry interexchange traffic for a  
14 CLEC without reasonable compensation." (*Iowa Order*, p. 37).

15 "Level 3 argues that the FCC's ISP Remand Order resolved the VNXX  
16 compensation issues by requiring that the originating carrier pay the terminating  
17 carrier at the default rate of \$0.0007 per minute. *Qwest argues, and the Board*  
18 *found, that the ISP Remand Order applies only to ISP-bound traffic in situations*  
19 *where the calling party and the ISP are physically located in the same local*  
20 *calling area. In a decision issued after the briefs were filed in this docket, the*  
21 *First Circuit reaches the same general result, as described below.*

22 \*\*\* [Discussion of *Global NAPs v. Verizon New England, Inc.* 444 F.3d 59 (1<sup>st</sup>  
23 Cir. 2006) omitted]. \*\*\*

24 In the end, the Board finds that Level 3's proposed solutions do not  
25 address the Board's compensation concerns in any meaningful manner. The  
26 Board's concern with VNXX has always been that a CLEC like Level 3 would be  
using Qwest's network to carry interexchange calls for free; any logical response  
to that concern would require some payment from Level 3 to Qwest. Instead,  
Level 3 claims that Qwest should make a payment to Level 3, or, at best, that the  
Board's bill-and-keep policy should apply, such that neither party would pay the  
other. Neither of these proposals addresses the problem identified by the Board."  
(*Iowa Order*, pp 38-40; emphasis added).

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DATED this 31st day of July, 2006.

QWEST CORPORATION

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# **EXHIBIT 1**

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:

LEVEL 3 COMMUNICATIONS, LLC,

Petitioner,

vs.

QWEST CORPORATION,

Respondent.

DOCKET NO. ARB-05-4

**ORDER ON RECONSIDERATION**

(Issued July 19, 2006)

**SUMMARY<sup>1</sup>**

Level 3 has requested reconsideration of the Arbitration Order the Board issued in this matter on December 16, 2005. While a number of issues are raised, many of them are related to the fact that Level 3 wants to offer VNXX services in Iowa and would prefer an interconnection agreement that makes VNXX service possible on an economical basis. The Board has considered VNXX traffic in previous dockets and has consistently expressed a concern that VNXX allows a CLEC to use the ILEC's network to carry interexchange traffic without compensation to the ILEC. The Board has also indicated that VNXX service could be allowed if this intercarrier compensation issue were addressed. In this docket, Level 3 has proposed to address the compensation issue by either (1) requiring that Qwest make a payment to Level 3 for every minute of traffic delivered or (2) exchanging the traffic on a bill-and-keep basis. The Board finds that these proposals fail to properly address the Board's concerns in any meaningful way. Accordingly, the Board will not change the principle points of its Arbitration Order as a result of this reconsideration.

This order also addresses all 17 of the Tier II issues, that is, issues that have been described as being derivative of the more significant Tier I issues.

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<sup>1</sup> This summary is provided solely for the convenience of the reader. It is not an official part of the Board's order and does not limit, alter, or affect the Board's actual decision in any way.

Remand Order. Qwest asserts the FCC rate is a cap, not a mandatory rate, citing paragraph 80 and footnotes 150 and 152 of that order.

**C. Analysis**

When the Board first considered the issues presented by VNXX service (in Docket Nos. SPU-02-11 and SPU-02-13), the Board expressed two concerns about them: First, it is potentially wasteful of telephone numbering resources, and second, because VNXX service effectively results in a CLEC (like Level 3) using Qwest's network to carry calls from one exchange to another for free, the Board was concerned with the intercarrier compensation aspects of the service, that is, that Qwest should not be required to carry interexchange traffic for a CLEC without reasonable compensation.

Since that order was issued, the Board's numbering efficiency concerns have been substantially reduced by the implementation of thousands-block number pooling in Qwest exchanges. However, the intercarrier compensation concerns remain and Level 3's proposals in this arbitration proceeding do not address those concerns.

As far as reconsideration is concerned, the Board will make no change in the original arbitration order with respect to VNXX issues. The arbitrated interconnection agreement should use Qwest's language on all VNXX issues. However, the Board does not agree that this is a "ban" on VNXX service, as characterized by Qwest. Instead, it represents a continuation of the Board's position that VNXX services present special problems that must be solved before VNXX is offered in Iowa.

As to the specific issues raised, the Board offers the following analysis and findings:

OneFlex is not VNXX. Qwest's offering of OneFlex service is fundamentally different from Level 3's VNXX proposal in at least one way: Level 3 has not cited any evidence in this record that Qwest's system uses another carrier's network in Iowa to carry interexchange calls without compensation to that other carrier. This has been the Board's primary concern with VNXX service from the time it was first presented to the Board; Level 3's proposal does not offer an answer to this problem, while Qwest's service avoids it altogether. There may be other features that distinguish OneFlex from VNXX, but this one, by itself, appears to be sufficient.

Moreover, as Qwest points out, a OneFlex customer cannot get a telephone number in a particular local exchange unless the customer purchases local service in the local calling area with which that number is associated. According to Qwest, when structured this way the service has no impact on the public switched telephone network (PSTN). This also differentiates OneFlex from VNXX.

Level 3's compensation proposals do not address the Board's concerns.

Level 3 argues that the FCC's ISP Remand Order resolved the VNXX compensation issues by requiring that the originating carrier pay the terminating carrier at the default rate of \$0.0007 per minute. Qwest argues, and the Board found, that the ISP Remand Order applies only to ISP-bound traffic in situations where the calling party and the ISP are physically located in the same local calling area. In a decision

issued after the briefs were filed in this docket, the First Circuit reaches the same general result, as described below.

In support of its preferred interpretation, Level 3 relies, in part, on an amicus brief the FCC filed in Global NAPs, Inc., v. Verizon New England, Inc., a proceeding before the First Circuit Court of Appeals. In that brief, counsel for the FCC said that the ISP Remand Order is ambiguous and could be read to support either interpretation, that is, it might mean that the default reciprocal compensation rate applies to VNXX or it might mean that the rate does not apply to VNXX. Level 3 argues that to the extent the ISP Remand Order is ambiguous, the Board should interpret it in a manner that allows Level 3 to offer VNXX service.

After the briefs were filed in this docket, the First Circuit issued its decision.<sup>17</sup> Qwest filed the decision with the Board on April 26, 2006, as supplemental authority. After reviewing the procedural history of the Global NAPs case and the ISP Remand Order, the Court found that the FCC's order does not preempt state regulation of access charges as applied to VNXX traffic. The Court says:

We find that there is a lack of clarity about whether the *ISP Remand Order* preempts state regulation of the access charges at issue here. Given the requirement of a clear indication that the FCC has preempted state law, the *ISP Remand Order* does not have the broad preemptive effect that Global NAPs seeks to assign to it.

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<sup>17</sup> Global NAPs v. Verizon New England, Inc., \_\_\_ F.3d \_\_\_, 2006 WL 924035 (C.A. 1 (Mass.))

(2006 WL 924035, page 13.) The Court therefore affirmed an order from the Massachusetts Department of Telecommunications and Energy that required Global NAPs to pay access charges to Verizon for VNXX traffic.

In the end, the Board finds that Level 3's proposed solutions do not address the Board's compensation concerns in any meaningful manner. The Board's concern with VNXX has always been that a CLEC like Level 3 would be using Qwest's network to carry interexchange calls for free; any logical response to that concern would require some payment from Level 3 to Qwest. Instead, Level 3 claims that Qwest should make a payment to Level 3 or, at best, that the Board's bill-and-keep policy should apply, such that neither party would pay the other. Neither of these proposals addresses the problem identified by the Board.

Effect of this decision on prior Board actions. Level 3 claims that the Board's decision in this proceeding is inconsistent with the Board's actions in two prior matters, specifically the "Order In Lieu Of Certificate" issued in TF-05-31 and the settlement the Board entered into in the "Managed Modem" appeal. The Board disagrees with Level 3 on these points.

First, Level 3 argues the "plain language" of the Board's order in lieu of certificate "authorizes the use of VNXX for VoIP services." (In. Br. p. 20.) Level 3 says the order defined (and prohibited) VNXX in terms of non-voice, dial-up, ISP-bound traffic. Level 3 then concludes that all other uses must be permitted. However, the Board's order was based on the Board's understanding that VNXX is limited to dial-up services (as opposed to broadband) and that dial-up service offers

inadequate speeds for VoIP service. In other words, at the time the order was issued the Board understood that VNXX could not be used for VoIP services. This record does not contain any evidence that this understanding is incorrect; it appears Level 3 is trying to create an exception for a non-existent service, perhaps in order to open the door to the services it actually proposes to offer.

Further, Level 3's argument is logically incorrect. Level 3 says, in effect, that because the Board described VNXX in terms that do not involve VoIP, VNXX must be permitted when it involves VoIP. This is not a logical interpretation of the Board's order. The Board defined VNXX in terms of its understanding of the service as it existed at that time and clearly indicated that VNXX would not be permitted until the intercarrier compensation issues are resolved to the Board's satisfaction. Thus, if VNXX has now evolved to include features that were not a part of VNXX at the time of the order that does not mean that these new features are automatically permitted. Instead, logic dictates that as long as the new features present the same intercarrier compensation issues as the original form of VNXX, then those new features also are not permitted until the issues are resolved.

Second, Level 3 argues that when the Board settled the Iowa Supreme Court appeal of the "Managed Modem" case, the Board actually "authorized VNXX for ISP-bound traffic in areas where thousand-block number pooling was in place." (In. Br. p. 21.) The Board finds this is a mischaracterization of the settlement agreement. In the settlement, the Board agreed that Level 3 could "obtain number resources and utilize VNXX architecture consistent with this Stipulation pursuant to or upon future

approval of an appropriate interconnection agreement in which the compensation issues are addressed." (Settlement, page 3, section 4.a, emphasis added; attached to Level 3's In. Br. at Attachment C.) Thus, the settlement is perfectly consistent with the Board's decision in this case; the Board's one remaining concern with VNXX is the intercarrier compensation issue, and once that issue is addressed in an agreement approved by the Board, VNXX will be permitted. The problem in this case is that Level 3's proposed solutions fail to address the Board's intercarrier compensation concerns in any meaningful manner.

#### **IV. VoIP and Intercarrier Compensation Issues**

This issue concerns VoIP calls and the potential application of access charges to some of those calls. The issue is related to the VNXX issue, above, in the sense that adopting Level 3's proposed language would potentially allow Level 3 (and its ISP customers) to offer voice communications services over large geographic distances without charging per-minute toll charges or paying access charges. In the arbitration order, the Board rejected Level 3's position and instead ruled that a voice call between separate local calling areas (LCAs) is a toll call and must be treated as such, regardless of the technology used, such that access charges would apply. (Arb. Order at 33.) Further, the Board agreed that the VoIP provider's point of presence (POP) is the relevant point to consider when determining whether a call is "between separate LCAs," because that is the point at which the call enters or leaves

the public switched telephone network (PSTN) and because the VoIP provider's POP is treated as the end user under the FCC's "ESP Exemption."<sup>18</sup>

**A. Level 3 arguments and Qwest responses**

Level 3 argues that the Board's decision on this issue is in error in two respects. First, Level argues that a telephone call is not a "toll call" just because it is made between local calling areas, and second, Level 3 argues that the FCC's ESP exemption does not require that the VoIP provider's POP be considered an end-point of the telephone call. (In. Br. p. 22.)

In support of its first argument, Level 3 says that under Federal law a call is not "telephone toll service" unless the call is both "long distance" (i.e., a call between separate LCAs) and "toll" (that is, subject to a separate charge other than a local service charge), citing 47 USC §§ 153(16) and (48) and 47 CFR § 51.701(b). Level 3 asserts that VoIP will not meet the second test. [The Board assumes this is because VoIP is typically offered on a flat-rate basis for all calls in the lower 48 states, although Level 3 does not go into detail. (In. Br. p. 23.)]

Qwest responds that the Act's definition of "telephone toll service" is unrelated to the question of whether access charges apply, noting that Level 3 cites no authority to establish this connection. Further, Qwest notes that under the FCC's rule 51.701(b)(1), VoIP calls that fall within the category of "interstate or intrastate

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<sup>18</sup> Order, *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631 (1988) (the "ESP Exemption Order").