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LEVEL 3 COMMUNICATIONS, LLC,
Complainant

vs.

QWEST CORPORATION,
Respondent

DOCKET NOS. T-01051B-05-0415
T-03654A-05-0415

**QWEST CORPORATION'S APPLICATION
FOR REHEARING AND MODIFICATION OF ORDER**

Pursuant to Arizona Revised Statutes § 40-253 and A.A.C. § R14-3-111, Qwest Corporation ("Qwest") hereby files its Application for Rehearing and Modification of the Opinion and Order in Decision No. 68855, entered in this docket by the Arizona Corporation Commission ("Commission") on July 28, 2006 (the "Order" or "Level 3 Complaint Order").

I. MATTERS FOR WHICH QWEST SEEKS REHEARING

Level 3 Communications, LLC ("Level 3") provides service to Internet Service Providers ("ISPs") using Virtual NXX ("VNXX") routing. The United States Second Circuit Court of Appeals recently observed that VNXX "disguises" interexchange traffic to make it appear to be

1 local, and violates the “FCC’s longstanding policy of preventing regulatory arbitrage,” thus
2 causing the ILEC to subsidize companies like Level 3 in their provision of service to their ISP
3 customers.¹ Qwest has made that point in this case previously and has argued that VNXX
4 routing violates Arizona rules. However, the Commission has displayed caution about
5 permanently banning VNXX the way some other regulatory agencies have done, and instead has
6 determined to pursue a generic docket regarding VNXX.²

7 At the same time, the Commission has found correctly that VNXX is “a departure from
8 the historic means of routing and rating calls and has broad implications for intercarrier
9 compensation.”³ And, as the *Order* correctly finds, under the terms of the Interconnection
10 Agreement (“ICA”) between Qwest and Level 3, the exchange of VNXX traffic over LIS trunks
11 is not allowed.⁴ In the *Level 3 Arbitration Order*, as well as in this *Order*, the Commission
12 orders Level 3 to cease and desist using VNXX.

13 However, under this Order Qwest will have to pay Level 3 for nearly two years’ worth of
14 past ISP traffic delivered via Level 3-arranged VNXX. It is logically impossible to conclude
15 that Qwest is obligated to pay terminating compensation on traffic that is not allowed by the
16 ICA, and that in all likelihood will ultimately be found by the Commission to be in violation of
17 the Commission’s rules. Additionally, the Order’s analysis of the “plain language” of the ISP
18 Amendment is clearly wrong, as is the analysis of the scope and meaning of the FCC’s *ISP*
19 *Remand Order*. The Commission should conclude that Qwest is not obligated to pay Level 3 for
20 the termination of VNXX ISP traffic for past periods, for all the reasons stated below. Qwest
21 requests rehearing of the Order’s conclusions and findings regarding the meaning of the ICA and
22

23 ¹ *Global NAPs v. Verizon New England*, 454 F.3d 91, 103 (D. C. Cir. July 5, 2006)
24 (“*Global NAPs IP*”). See also *id.*, at 95, 99. See more detailed discussion of this case in Section
25 II.B, *infra*.

25 ² Pac-West Order (Decision No. 68220) ¶ 29, Level 3/Qwest Arbitration Order (Decision
26 No. 68817), at p. 82, lines 22-24.

26 ³ Order No. 68820, ¶ 29.

⁴ *Order* ¶ 60.

1 the FCC's *ISP Remand Order* (*Order* ¶¶ 54-59) and the first Ordering clause stated at page 14, to
2 the extent it requires Qwest to compensate Level 3 for traffic to ISP delivered *via* VNXX.

3 Qwest also asks that the Commission reconsider whether Level 3's use of VNXX violates
4 Commission rules.

5 Last, Qwest asks that the Commission reconsider those portions of the *Order* requiring
6 retroactive payment for all ISP traffic to October 8, 2004, the date the FCC issued its *Core*
7 *Forbearance Order*⁵ changing the law previously articulated by the FCC in the *ISP Remand*
8 *Order*. The Commission errs by requiring the parties to amend their agreement retroactive to the
9 date of the change of law.

10 II. ARGUMENT

11 A. The "Plain Language Of the ICA" Does Not Support The *Order's* Conclusion (¶ 59) 12 That Qwest Must Pay Terminating Compensation on VNXX Traffic

13 The *Order* notes that the section of the ISP Amendment quoted at paragraph 54 does not
14 carve out, or except, VNXX ISP-bound traffic from the scope of ISP-bound traffic. However,
15 failure to mention VNXX in the Amendment can best be explained by the fact that the parties did
16 not need to carve out that which was never included in the first place. The *Order* concludes:
17 "[U]nder the terms of the ICA, the use of LIS trunks is limited to EAS/local traffic that is
18 originated and terminated within a LCA. VNXX ISP-bound traffic does not originate and
19 terminate in the same LCA. Thus the terms of the ICA do not allow for the exchange of VNXX
20 traffic over LIS trunks." (*Order* ¶ 60, emphasis added). Therefore, the fact that the ISP
21 Amendment does not carve out VNXX traffic provides no basis for finding that Qwest must pay
22 termination for such traffic. Indeed, the absence of any reference to VNXX in the Amendment is
23 compelling evidence that the parties did not intend to include it.

24 The *Order's* conclusion that VNXX ISP traffic is subject to the compensation scheme

25 ⁵ *Petition of Core Communications, Inc. For Forbearance Under 47 U.S.C. §160(C)*
26 *From Application of The ISP Remand Order*, 19 FCC Rcd. 20, 179, 20,189 (2004). ("*Core*
Forbearance Order").

1 established in the *ISP Remand Order* is not supported by the “plain language of the ICA,”
2 because, as the *Order* itself establishes, other parts of the ICA plainly contradict such a
3 conclusion. As already noted, the *Order* concludes correctly that “the terms of the ICA do not
4 allow for the exchange of VNXX traffic over LIS trunks.” (*Id.* ¶ 60). Further, the *Order* directs
5 Level 3 to discontinue the use of VNXX arrangements. (*Id.* ¶ 63). Therefore, there is no
6 uncontradicted, plain meaning that Qwest is obligated to pay for VNXX traffic, because the ISP
7 Amendment cannot reasonably be interpreted to require payment for traffic delivered by means
8 which are *forbidden by other provisions of the very same agreement*. The Commission’s
9 conclusion that Qwest must pay compensation for VNXX ISP traffic is therefore arbitrary and
10 capricious.

11 Further, the Commission’s finding that Qwest is obligated to pay for ISP traffic delivered
12 via VNXX is erroneous because the ISP Amendment could not reasonably be interpreted to
13 require payment for traffic delivered by means which violate numerous Commission and FCC
14 rules.

15 The *Order*’s finding that VNXX ISP traffic is compensable as ISP-bound traffic is
16 demonstrably wrong for additional reasons. The Parties clearly stated their intent that the ISP
17 Amendment was to apply only to the traffic that is subject to the *ISP Remand Order*, nothing
18 more and nothing less.⁶ Indeed, the *Order* itself states that “Under the plain language of the

19
20 ⁶ That the ISP Amendment has the same scope and legal effect as the *ISP Remand Order*
21 is established by at least three references to the *ISP Remand Order*: (i) the recital clause of the
22 ISP Amendment that “the Parties wish to amend the [ICA] to *reflect the [ISP Remand Order]*;
23 (ii) Section 3.1 of the ISP Amendment, which states, “The Parties shall exchange ISP-bound
24 traffic *pursuant to the compensation mechanism set forth in the FCC ISP Order*; and (iii)
25 Section 2 of the ISP Amendment, which states, “The Parties agree to exchange all EAS/Local
26 (§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*.” (Emphasis added). Thus, the ISP Amendment
has the same scope as the *ISP Remand Order*, no greater and no less. Arbitrator John Antonuk
reached the same rule of interpretation of the ISP Amendment in the Arbitration Ruling between
Qwest and Pac-West Telecomm (AAA Case #77181-00385-02, JAG Case No. 221368, 2004).
In interpreting the ISP Amendment in that case, the Arbitrator concluded, “The parties’ intent
was to do no more and no less than what the FCC provided for in the *ISP Remand Order* . . .”

1 ICA, VNXX ISP-bound traffic is subject to the compensation scheme established in the *ISP*
2 *Remand Order*. (*Order* ¶ 59, emphasis added). However, the *Order* found that the court
3 decisions cited by Qwest are not determinative on the scope of the *ISP Remand Order* (*Id.* ¶¶ 56-
4 58), and that the FCC did not take a position on which reading of the *ISP Remand Order* was
5 intended (*Id.* ¶ 55). Even though the Commission does not find any persuasive precedent for
6 reading the *ISP Remand Order* one way or the other, (because “the FCC did not take a position
7 on which reading was intended, and acknowledged the [*ISP Remand Order*] could be read both
8 ways”), the Commission adopts an interpretation of the Amendment that can only flow from an
9 interpretation of the *ISP Remand Order* that permits payment for the disputed traffic. The
10 Commission’s result is a stark departure from its own rule of construction. If the Commission is
11 right when it concludes that the meaning of the *ISP Remand Order* is unclear, it is illogical and
12 unreasonable for the Commission to then use the “meaning” of the *ISP Remand Order* to impute
13 a meaning into the ISP Amendment.

14 More fundamentally, however, as discussed hereafter, the law is now clear that the term
15 “ISP-bound traffic (as that term is used in the FCC ISP Order)” excludes VNXX ISP traffic and
16 applies only to ISP traffic where the calling party and the ISP are physically located in the same
17 local calling area (*i.e.*, local ISP traffic). Second, there is no basis to conclude that VNXX
18 traffic is EAS/Local traffic, because EAS/Local traffic is defined as traffic originated and
19 terminated in the same Local Calling Area (“LCA.”). And third, under the *ISP Remand Order*,
20 which remains fully in effect, ISP traffic is not section 251(b) (5) traffic.

21 One of the errors of the *Order* is its complete inconsistency with the Commission’s
22 Decision No. 68817, where, in response to the claim by Level 3 that the *ISP Remand Order*
23 constitutes an endorsement of VNXX, the Commission concluded that “[i]f the FCC had
24 intended the *ISP Remand Order* as an endorsement of the use of VNXX, we believe it would
25 have at least mentioned it.”⁷ Yet, in the face of that Commission finding, the *Order* concludes

26 _____
⁷ Decision No. 68817, at 27.

1 that VNXX-delivered ISP traffic is subject to the compensation scheme established by the *ISP*
2 *Remand Order*. (Order ¶ 59).

3
4 **B. The Order's Conclusion That the *Worldcom* and *Global NAPs I* Court Decisions Are
5 Not Determinative In This Case (¶ 58) Is Error.**

6 The *Order* concludes that neither *WorldCom, Inc. v. FCC*⁸ ("*WorldCom*") nor the First
7 Circuit's decision in *Global NAPs v. Verizon New England*⁹ ("*Global NAPs I*") are determinative
8 of the scope of the *ISP Remand Order* (Order ¶ 58). This conclusion is incorrect. Moreover,
9 those two decisions were reaffirmed by two more federal circuit court decisions (another from
10 the D.C. Circuit and a decision of the Second Circuit) that likewise conclude that the scope of the
11 *ISP Remand Order* is limited to local ISP traffic. Given those clear holdings, there is simply no
12 basis to conclude that the law regarding the scope of the *ISP Remand Order* is unsettled.

13 Qwest's Opening and Response briefs, which are incorporated herein by reference,
14 provided a detailed analysis of the history leading up to the *ISP Remand Order* and an analysis
15 of the order itself, all of which demonstrates conclusively that the *ISP Remand Order* applies
16 only to local ISP traffic. (Qwest Opening Brief at 11-17, Qwest Reply Brief, at 5-8).¹⁰ But other
17 compelling authority leads to the same conclusion. Four federal circuit court decisions have all
18 concluded that the *ISP Remand Order* applies to calls to an ISP in the same LCA as the caller
19 and that existing state and federal compensation regimes for interexchange calls remain
20 unaffected by the order.

21 The first statement on the question of the breadth of the *ISP Remand Order* came in the

22 ⁸ 288 F.3d 429 (D.C. Cir. 2002).

23 ⁹ 444 F.3d 59 (1st Cir. 2006).

24 ¹⁰ Among those reasons were the fact that the context and language of the *ISP Remand*
25 *Order* make clear that the only issue being considered by the FCC was local ISP traffic (*ISP*
26 *Remand Order* ¶¶ 10-13), a proposition that is confirmed by FCC's unequivocal statements that
it had no intent to interfere with either the interstate or intrastate access charge regime that
applies to interexchange calls (*Id.* ¶¶ 34-41). Those reasons alone are more than sufficient to
conclude that the *ISP Remand Order* applies only to local ISP traffic.

1 D.C. Circuit's review of the *ISP Remand Order* in *WorldCom*, where the D.C. Circuit stated the
2 *holding* of the *ISP Remand Order*: "In the order before us the [FCC] *held* that under § 251(g) of
3 the Act it was authorized to 'carve out' from § 251(b)(5) calls made to internet service providers
4 ("ISPs") *located within the caller's local calling area.*"¹¹ Thus, the court that was statutorily
5 armed with exclusive jurisdiction to review the *ISP Remand Order* states, in plain and
6 unequivocal language, that the *ISP Remand Order* applies *solely* to local ISP traffic. Events
7 since *WorldCom* have demonstrated that the D. C. Circuit's description of the holding of the
8 order is not unsettled.

9 The most definitive subsequent decision is the *Global NAPs I* decision, wherein the First
10 Circuit ruled that the scope of the preemption in the *ISP Remand Order* applies only to local ISP
11 traffic. After the case was fully briefed and argued, the First Circuit panel asked the FCC to
12 comment on the scope of the *ISP Remand Order*, which the FCC did in an *Amicus Brief*.¹² The
13 *Order* suggests that, because the FCC declined to opine on the ultimate question, the *Amicus*
14 *Brief* leaves the question of the scope of the order in an "unsettled" state (*Order* ¶¶ 55, 57). But
15 this position can only be reached by ignoring the very specific comments made by the FCC and
16 by ignoring the clear holding of *Global NAPs I*. While declining to take a position on the
17 ultimate question, the FCC was extremely specific and forthright in stating that the *only issue*
18 before the FCC in the *ISP Remand Order* was intercarrier compensation for local ISP traffic:

19 "The administrative history that led up to the *ISP Remand Order* indicates that in
20 addressing compensation, *the Commission was focused on calls between dial-up*
21 *users and ISPs in a single local calling area. . . .* Thus, when the Commission
22 undertook in the *ISP Declaratory Ruling* to address the question "whether a local
exchange carrier is entitled to receive reciprocal compensation for traffic that it
delivers to . . . an Internet service provider," . . . *the proceeding focused on calls*
that were delivered to ISPs in the same local calling area.'

23 ***The administrative history does not indicate that the Commission's focus***
24 ***broadened on remand.*** The *ISP Remand Order* repeats the Commission's
understanding that "an ISP's end-user customers typically access the Internet

25 ¹¹ 288 F.3d at 430 (emphasis added).

26 ¹² A copy of the *Amicus Brief* was attached to Qwest's fourth filing of supplemental
authority.

1 through an ISP service located in the same local calling area.” . . . *The Order*
2 *refers multiple times to the Commission’s understanding that it had earlier*
3 *addressed – and on remand continued to address – the situation where ‘more*
4 *than one LEC may be involved in the delivery of telecommunications within a*
5 *local service area.’” (*Id.* at 12-13; citations to *ISP Remand Order* omitted;
6 emphasis added).*

7 The *Order’s* conclusion cannot be squared with the FCC’s own unequivocal statements that only
8 local ISP traffic was at issue. Unless one were to make the unsupported argument that the FCC
9 rendered a decision on an issue that it acknowledges was not even before it, the only issue FCC
10 could have decided in the order was the compensation regime for local ISP traffic. That is
11 precisely the holding *Global NAPs I*, that the FCC did not preempt the existing access charge
12 rules applicable to interexchange calls placed to ISPs. 444 F.3d at 72. The First Circuit further
13 noted that the *ISP Remand Order* reaffirmed the distinction between reciprocal compensation
14 and access charges:

15 The FCC has consistently maintained a distinction between local and
16 “interexchange” calling and the intercarrier compensation regimes that apply to
17 them, and reaffirmed that states have authority over intrastate access charge
18 regimes. Against the FCC’s policy of recognizing such a distinction, a clearer
19 showing is required that the FCC preempted state regulation of both access
20 charges and reciprocal compensation for ISP-bound traffic. . . .

21 Indeed, in the *ISP Remand Order* itself, the FCC reaffirmed the distinction
22 between reciprocal compensation and access charges. It noted that Congress, in
23 passing the TCA, did not intend to disrupt the pre-TCA access charge regime,
24 under which “LECs provided access services . . . in order to connect calls that
25 travel to points-both *interstate* and intrastate-beyond the local exchange. In turn,
26 both the Commission and the states had in place access regimes applicable to this
traffic, which they have continued to modify over time.” *ISP Remand Order* ¶ 37.
(444 F.3d at 73).

The court also quoted several statements from the *Amicus Brief* that support “the conclusion that
the order did not clearly preempt state regulation of intrastate access charges.” *Id.* at 74. Thus,
since *Global NAPs I* holds unequivocally that the *ISP Remand Order* did not establish a
compensation regime applicable to non-local ISP traffic (VNXX), the Arizona Commission
retains authority over intrastate access charges, those charges remain fully in effect, and any

1 change to the tariffs that impose the charges may occur only after proper notice and hearing
2 (neither of which has occurred). The fact that, in its *Amicus Brief*, the FCC did not reach a
3 conclusion on the ultimate issue of the scope of the order is irrelevant because the First Circuit
4 was unequivocal on that issue, concluding through the application of its appellate authority to
5 interpret a federal administrative order that the *ISP Remand Order* applies only to local ISP
6 traffic.

7 In the past two months, the D. C. Circuit, in *In re Core Communications*,¹³ and the
8 Second Circuit, in *Global NAPs v. Verizon New England*¹⁴ (“*Global NAPs II*”), have weighed in
9 on this issue, and both confirm the conclusions reached in *WorldCom* and *Global NAPs I*.

10 In *Core Communications*, the D. C. Circuit (the same court that decided *WorldCom*)
11 upheld the FCC’s order that removed the new markets rule and growth cap rule that were
12 initially adopted in the *ISP Remand Order*. In the course of describing the history leading up to
13 the order under consideration, the court described the *ISP Remand Order*:

14 “[The FCC] found that calls made to ISPs located with the caller’s local calling
15 area fall within those enumerated categories—specifically, that they involve
16 ‘information access.’ . . . Those calls, the FCC concluded, are not subject to §
251(b) (5), but are instead subject to the FCC’s regulatory authority under § 201. .
..”¹⁵

17 It is impossible to read this carefully crafted language as anything other than a reaffirmation of
18 the *WorldCom* conclusion that the *ISP Remand Order*’s holding applies only to local ISP
19 traffic.¹⁶

20 Finally, on July 5, 2006, the Second Circuit issued the *Global NAPs II* decision, wherein
21 it affirmed the Vermont Board’s decision to ban VNXX in Vermont. The court first concluded
22 that, while the FCC has addressed Internet compensation issues, it “has never directly addressed

23 ¹³ 2006 WL 1789003 (D. C. Cir. June 30, 2006).

24 ¹⁴ 454 F.3d 91 (2nd Cir., July 5, 2006),

25 ¹⁵ 2006 WL 1789003, at *2 (citations to *ISP Remand Order* and other authorities omitted;
emphasis added).

26 ¹⁶ It is likewise impossible to conclude, given these decisions, that the term “ISP-bound,”
as used in the *ISP Remand Order*, is anything other than a term of art used by the FCC to refer to
local ISP traffic. A broader reading of that term results in an illogical, nonsensical result.

1 the issue of ISP-bound calls that cross local-exchange boundaries.” 454 F.3d at 95. The
2 implication of that statement is obvious. If the FCC has never addressed the issue of terminating
3 compensation for VNXX ISP traffic, the *Order*’s conclusion that “the *ISP Remand Order* applies
4 to all ISP-bound traffic” (*Order* ¶ 59) is a logical impossibility. If the FCC only addressed local
5 ISP traffic, it is impossible to say that the *ISP Remand Order* applies to non-local (VNXX)
6 traffic. During the course of its decision, the Second Circuit cited *Global NAPs I* approvingly
7 for the proposition that “[t]he ultimate conclusion of [*ISP Remand Order*] was that ISP-bound
8 traffic *within a single calling area* is not subject to reciprocal compensation.” 454 F.3d at 99,
9 citing *Global NAPs I* (italics added by the court).¹⁷

10 There are only two conclusions that can be reached from these cases. First, the FCC did
11 not address VNXX ISP traffic in the *ISP Remand Order* and, second, there is no rational way to
12 conclude that the *ISP Remand Order* applies to anything other than what it did address: local ISP
13 traffic.¹⁸ It is therefore erroneous to conclude that the ISP Amendment, whose sole purpose was
14 to implement the *ISP Remand Order*, prescribed intercarrier compensation for traffic that was
15 not addressed in the *ISP Remand Order*. In light of the consistent and identical conclusions
16 reached by each of these federal appellate courts, it is hard to conceive of an issue that is more
17 firmly settled than the scope of the *ISP Remand Order*. The *Order*’s findings, in particular
18 paragraphs 55-59, that reach a different conclusion are erroneous as a matter of law and must be
19 reversed.

20 C. VNXX Violates Various Arizona Corporation Commission and FCC Rules

21
22 ¹⁷ The court also noted that to accept the CLEC’s arguments “would allow carriers to
operate entirely outside the [access charge] compensation scheme so long as they provide some
service to an ISP.” 454 F.3d at 101.

23 ¹⁸ See, e.g., *Neshaminy School Dist. v. Karla B.*, 1997 WL 563421, at *7 (E.D. Pa. 1997)
24 (Holding that an administrative agency “overstepped its authority by addressing an issue not
before it. . . . [I]n order for the administrative review system to function properly, issues in
25 dispute must be squarely placed before the agency for its consideration. If the issues are not
raised and fully argued before the agency, *then the agency cannot properly decide the issue.*”
26 (emphasis added). Under this principle and in light of the FCC’s own statements that the only
issue before it was intercarrier compensation for calls placed to an ISP in the same LCA as the
caller, the *ISP Remand Order* cannot be read, as the Order does, to apply more broadly.

1 **Prescribing the Classification of Traffic and related Inter-carrier Compensation**
2 **Rules and Tariffs**

3 In its previous filings in this Docket, Qwest has repeatedly pointed out to the
4 Commission that VNXX violates several Commission rules. Qwest incorporates by reference
5 the arguments it has made previously in this docket,¹⁹ as a part of this application for rehearing,
6 including but not limited to, the illegality of VNXX routing under existing Arizona rules. In
7 particular, Commission Rule 14-2-1305(A) provides that “the incumbent LEC’s local calling
8 areas and existing EAS boundaries will be utilized for the purpose of classifying traffic as local,
9 EAS, or toll for purposes of intercompany compensation.” Level 3 has violated this rule by
10 assigning telephone numbers for the purpose of reclassifying long distance (or toll) traffic as
11 local traffic, thus depriving Qwest of the intercarrier compensation that Qwest is entitled to
12 receive. The *Order* violates Rule 14-2-1305(A) because it applies intercarrier compensation
13 applicable only to calls placed to an ISP in the same local calling area as the caller (*i.e.*, local
14 traffic) to interexchange traffic. For related reasons, the Order cannot be reconciled with
15 Commission Rules R14-2-1102(7) (defining “local exchange service”), Commission Rule R14-
16 2-501(23) (defining “toll service”), Arizona Code § 4-329, or the Commission’s decision in the
17 AT&T Arbitration.²⁰

18 The *Order* likewise violates the FCC’s rule that requires that ISPs be treated as end users
19 for purposes of applying access charges. The *Order* in essence substitutes the *ISP Remand*
20 *Order’s* compensation scheme for the access charge regime applicable to interexchange traffic
21 under which ISPs are treated as end users. This is a violation of both federal and Arizona law.

22 When Level 3 engages in VNXX, it offers what is in substance a 1-800 toll free service
23 for which Qwest is lawfully entitled to charge originating access under its tariffs.²¹ Level 3 has

24 ¹⁹ Qwest’s Opening Brief, 19-27.

25 ²⁰ Opinion and Order, *In the Matter of the Petition of AT&T Communications of the*
26 *Mountain States, Inc. and TCG Phoenix, for Arbitration with Qwest Corporation, Inc. Pursuant*
to 47 U.S.C. Section 252(b), Docket Nos. T-02428A-03-0553 and T-01051B-03-0553 (Ariz.
Corp. Comm’n, April 6, 2004)

²¹ Section 2.2.1 C.4. of Qwest’s Exchange and Network Service Price Cap Tariff:

1 attempted to avoid paying the applicable access charges by engaging in VNXX. As a Vermont
2 arbitrator stated, “a CLEC using VNXX offers the equivalent of incoming 1-800 service, without
3 having to pay any of the costs associated with deploying that service.”²²

4 At the open meeting in this matter, Commission Staff stated its belief that the
5 Commission had authority to prescribe intercarrier compensation for VNXX traffic. In
6 particular, Staff stated that “[o]nce VNXX, then, is placed outside of the ISP Remand Order, the
7 state commissions can pretty much decide what compensation regime should apply to it.”²³
8 Under Arizona law, Staff is simply wrong. The Commission cannot eliminate the rates set forth
9 in Qwest’s access tariffs and set new rates for Level 3 applicable to VNXX traffic without
10 conducting the fair value determination for each company required by article XV, §14 of the
11 Arizona Constitution,²⁴ a point made by Commissioner Gleason at the open meeting.²⁵ To be
12 sure, Arizona law prohibits retroactive ratemaking and changes in rates such as those made in the
13 *Order* can only be made after a hearing and can only operate prospectively.

14 Inexplicably, the Commission failed to find that Level 3’s use of VNXX violates the
15 foregoing rules, despite the Commission’s conclusion that “VNXX ISP-bound traffic does not
16 originate and terminate in the same LCA.” (*Order* ¶ 60). Nor does the Commission explain
17 why, consistent with the public good, the Commission is enforcing a contract against Qwest,
18 compelling Qwest to pay for the termination of traffic that Level 3 has generated and caused to
19 be routed in violation of multiple Commission rules. It is arbitrary and capricious for the
20 Commission to refuse to enforce the ICA’s contractual provisions and applicable federal and

21 “Providers of interexchange service, that furnish service between local calling areas, must
22 purchase services from the Access Service Tariff for their use in furnishing their authorized
intrastate telecommunications services to end user customers.”

23 ²² *Petition of Global NAPs, Inc. for Arbitration Pursuant to §252(b) of the*
24 *Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New*
England, Docket No. 6742, 2002 Vt. PUC LEXIS 272, at *41-42 (VT. PSB 2002).

25 ²³ July 25, 2006 Open Meeting Transcript, p. 27.

26 ²⁴ *U S WEST Communications, Inc. v. The Arizona Corporation Commission*, 201 Ariz
242, 34 P.3d 351 (Ariz. Supreme Court 2001).

²⁵ July 25, 2006 Open Meeting Transcript, pp. 50-51.

1 state rules that Level 3 has violated and at the same time require payment of intercarrier
2 compensation to Level 3 that Level 3 is not entitled to.

3
4 **D. The Commission Should Align Its Decision With Federal Policy Objectives.**

5 In *Global NAPs II*, the Second Circuit issued a strong reminder of the policy purposes of
6 the FCC, one of which it emphasized at length in upholding a total ban on VNXX: to prevent
7 arbitrage schemes that benefit the arbitrageur to the detriment of the company that has made the
8 actual investment in the network. For example, the court noted that the FCC has warned many
9 times of companies who enter the market

10 "not so much to expand competition as to take advantage of the relatively rigid
11 regulatory control of the incumbents. In connection with this concern, the FCC
12 has warned time and time again that it will not permit competitors to engage in
13 regulatory arbitrage—that is, build their businesses to benefit almost exclusively
14 from the existing carrier compensation regimes at the expense of both the
15 incumbents and the consumer." 454 F.3d at 95.

16 Thus, the court noted that it makes good sense for state commissions and not CLECs to define
17 LCAs because "if carriers were free to define [LCAs] for the purposes of intercarrier
18 compensation, the door would be open to *overweening conduct* by the CLECs. . . . Permitting
19 CLECs to define [LCAs] and thereby set the rules for the sharing of infrastructure would
20 eventually require the ILECs to absorb all the costs and allow the CLECs to reap all the profits."
21 *Id.* at 99 (emphasis added). The court's final words in its decision are telling:

22 "Global's desired use of virtual NXX simply *disguises traffic* subject to access
23 charges as something else and would force Verizon to subsidize Global's services.
24 This would likely place a burden on Verizon's customers, a result that would
25 violate the FCC's longstanding policy of preventing regulatory arbitrage. Telecommunications regulations are complex and often appear contradictory. But
26 the FCC has been consistent and explicit that it will not permit CLECs to game the system and take advantage of the ILEC's in a purported quest to compete."
Id. at 103.

These are precisely the policy issues here. Qwest has invested extensively in a state-wide
network in Arizona, most specifically in the local distribution plant, loop plant, carrier systems,

1 and local switches without which Level 3 would have no access to Qwest local customers. Yet,
2 Level 3 not only wants to use those facilities free, it wants to profit from Qwest through the
3 application of terminating compensation charges on all ISP traffic. That position is not
4 consistent with the amendment, or with the *ISP Remand Order*, and results in precisely the
5 regulatory arbitrage so strongly criticized by the Second Circuit.

6
7 **F. The Commission Unlawfully Gave the Core Amendment Retroactive Effect**

8 In Count Two of the Complaint, Level 3 alleged that Qwest failed to negotiate in good
9 faith regarding changes in law brought about by the *ISP Remand Order* and the *Core*
10 *Forbearance Order*, and Level 3 sought an order from the Commission for the immediate
11 approval of Level 3's proposed amendment (the "Core Amendment"), with retroactive
12 effectiveness to the date of the *Core Forbearance Order*, October 8, 2004. Although the
13 Commission did not make any finding that Qwest did not negotiate in good faith the
14 Commission nevertheless ruled that Qwest must pay retroactively for all ISP traffic, including
15 the disputed VNXX traffic, back to the date of the change of law. The Commission provides no
16 reason for retroactive effectiveness, and does not explain why the change of law provisions of
17 the parties' ICA should not control.

18 The attachments to the Complaint and Qwest's Answer document that the parties
19 engaged in an exchange of proposals to amend the ICA to reflect the *Core Forbearance Order*.
20 It is clear that the issue about which the parties could not agree is whether Qwest must pay
21 compensation on VNXX -delivered traffic destined for Level 3's ISP customers. Qwest
22 proposed language consistent with its interpretation of the *Core Forbearance Order*.

23 The ICA sets forth a specific process for addressing changes in applicable law, and if
24 negotiations are unsuccessful, the parties are to bring the dispute to this Commission for
25 resolution of appropriate amendment language Section 2.2 of the parties' the Interconnection
26 Agreement specifies as follows:

1 To the extent that the Existing Rules are changed, vacated, dismissed, stayed or
2 modified, then this Agreement and all contracts adopting all or part of this
3 agreement shall be amended to reflect such modification or change of the Existing
4 Rules. Where the Parties fail to agree upon such an amendment within sixty (60)
5 days from the effective date of the modification or change of the Existing Rules, it
6 shall be resolved in accordance with the Dispute Resolution provision of this
7 Agreement.²⁶

8 Given that the *Core Forbearance Order* became effective in October, 2004, Level 3 could have
9 immediately requested negotiations with Qwest, exercised its rights for dispute resolution, and
10 invoked the options contained in the Interconnection Agreement as early as mid-December,
11 2004. Instead, it filed a complaint on June 10, 2005, some eight months after the effective date
12 of the *Core Forbearance Order*. Among the options available to Level 3, which it eschewed,
13 would have been to ask the Commission to arbitrate the dispute. Instead, Level 3 filed the
14 Complaint for prospective and retroactive relief, based on the legal theory that VNXX ISP traffic
15 is compensable. In fact, Level 3's legal theory turned out to be wrong, and Qwest's position in
16 the negotiations that the Core Amendment should not require payment for VNXX ISP traffic is
17 vindicated by the *Order*, which finds in ¶62 that "the Core Forbearance Amendment as proposed
18 by Level 3 is not consistent with the holdings of Decision No. 68817."

19 With no explanation of why the change of law provisions of the ICA should not control,
20 without finding that Qwest acted in bad faith in not acceding to Level 3's demand that the Core
21 Amendment include payment for VNXX traffic, and without explaining why Qwest is obligated
22 to pay for traffic that the Commission simultaneously rules is not compensable on a prospective
23 basis, the Commission granted Level 3's request that Qwest must sign the Core Amendment,
24 with retroactive effectiveness to the date the FCC issued the Core Forbearance Order, October 8,
25 2004. The *Order's* retroactive effect to the date of the change of law, is not required by the *Core*
26 *Forbearance Order*, is not consistent with the contractual process for amendments to ICAs, and
conflicts with other provisions of the *Order*. For the foregoing reasons, the *Order* is illogical,
unreasonable, arbitrary and capricious, and therefore unlawful.

²⁶ Level 3/Qwest Interconnection Agreement, Section 2.2.

1 Further, the retroactive effect of the *Order* violates the law in other respects. It is
2 necessary to give amendments to interconnection agreements prospective effect upon review and
3 approval by the Commission precisely because the Commission has a statutory obligation to
4 review and approve ICAs and changes to them.²⁷ That ICA Amendments have prospective,
5 rather than retroactive effect is the law in Arizona and other states.

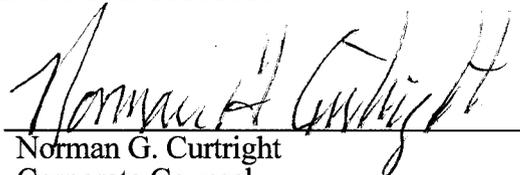
6 For the foregoing reasons, there is no basis for the Commission's order requiring
7 payment retroactive to October 8, 2004, and the Commission should reverse those provisions.²⁸

8 III. CONCLUSION

9 Based on the foregoing, Qwest respectfully requests the Commission to reconsider its
10 Order set forth in Decision No. 68855, and modify that Order consistent with the principles set
11 forth above.

12
13 RESPECTFULLY SUBMITTED this 15th day of August, 2006.

14 QWEST CORPORATION

15
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22
23 _____
24 ²⁷ 47 U.S.C. §252(e);

25 ²⁸ In paragraph 61 of the *Order*, the Commission made reference to the portion of Order
26 No. 68817, wherein the Commission ordered Qwest and Level 3 to implement a replacement for
VNXX that it referred to as "FX-like." Qwest and Level 3 are currently discussing that issue
but have not reached resolution. Thus, to the extent the resolution of that still-open issue may
have some future impact on the *Order*, Qwest hereby reserves its rights.

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