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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION  
DOCKET CONTROL

PAC-WEST TELECOMM, INC.

Complainant,

vs.

QWEST CORPORATION,

Respondent.

LEVEL 3 COMMUNICATIONS, LLC

Complainant,

vs.

QWEST CORPORATION,

Respondent.

) DOCKET NO. T-01051B-05-0495

) DOCKET NO. T-03693A-05-0495

) DOCKET NO. T-03654A-05-0415

) DOCKET NO. T-01051B-05-0415

Arizona Corporation Commission

DOCKETED

OCT 1 2010

DOCKETED BY

LEVEL 3 COMMUNICATIONS, LLC

INITIAL BRIEF

October 1, 2010

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1 **I. INTRODUCTION AND SUMMARY.**

2  
3 1. Level 3 Communications, LLC (“Level 3”) submits this Initial Brief pursuant to the  
4 Procedural Order dated August 24, 2010 (the “Procedural Order”) of the Arizona Corporation  
5 Commission (“ACC” or “Commission”) in the above-captioned consolidated proceedings. In that  
6 Order, the ACC directed the Parties to address the following four questions:

- 7
- 8 (a) Whether VNXX ISP-bound traffic was subject to reciprocal compensation under  
Section 251(b)(5) at the time relevant to the dispute arising from the ISP  
Amendment to the ICAs;
  - 9 (b) If not Section 251(b)(5) traffic, how ISP-bound traffic should be categorized for  
10 compensation purposes;
  - 11 (c) Whether the appropriate classification can be made solely as a question of law; and
  - 12 (d) If not, what facts are necessary in order to make a determination how to classify ISP-  
13 bound traffic, and whether a hearing on the record is necessary to create a factual  
record or can/will the parties stipulate to the relevant facts.

14 Procedural Order at 5-6.

15 Level 3’s responses are as follows:

16 *Applicability of Section 251(b)(5).* In November 2008, the FCC issued a ruling  
17 setting forth its interpretation of the scope and meaning of Section 251(b)(5).<sup>1</sup> That ruling clearly  
18 holds that Section 251(b)(5) applies to ISP-bound traffic. Nothing in it suggests that the FCC  
19 believes that Section 251(b)(5) is limited to traffic that is geographically (or in any other sense)  
20 “local.” To the contrary, the FCC took pains to expressly and repeatedly reject the notion that the  
21 “local” status of traffic is relevant to its interpretation of the statute.<sup>2</sup> As a result, Section 251(b)(5)  
22

23  
24 <sup>1</sup> High-Cost Universal Service Support; Federal-State Joint Board on Universal Service;  
25 Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource  
26 Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act  
27 of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for  
ISP-Bound Traffic; IP-Enabled Services, *Order on Remand and Report and Order and Further  
Notice of Proposed Rulemaking*, 24 FCC Rcd 6475 (2008) (“November 2008 Order”), *affirmed*,  
*Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010).

<sup>2</sup> See, e.g., *Id.* at ¶ 7.

1 applies to VNXX ISP-bound traffic along with all other ISP-bound traffic. Moreover, because the  
2 November 2008 ruling supplied the legal analysis underlying the FCC's authority to determine  
3 intercarrier compensation rates and arrangements for ISP-bound traffic – analysis that the D.C.  
4 Circuit required in May 2002 (and which had been missing since that time), the legal force of the  
5 FCC's ruling relates back at least to May 2002. It therefore applies to the entire period at issue in  
6 this case. As a result, all VNXX ISP-bound traffic at issue here is subject to reciprocal  
7 compensation under the regime established by the FCC.

8 ***Classification of VNXX ISP-Bound Traffic if Section 251(b)(5) does not apply.***

9 All ISP-bound traffic is jurisdictionally interstate.<sup>3</sup> As a result, state regulators would not normally  
10 have any jurisdiction over it and, specifically, would have no jurisdiction to dictate anything about  
11 intercarrier compensation arrangements with respect to it. However, the Section 251/252  
12 interconnection process applies to both interstate and intrastate traffic. As a result, if Section  
13 251(b)(5) does not apply, then the Commission may acquire jurisdiction over this traffic (and  
14 intercarrier compensation for it) only if, and to the extent that, such traffic and compensation are  
15 addressed in the parties' interconnection agreement ("ICA"). That is, the Commission's authority  
16 to arbitrate, approve, and interpret ICAs covers both interstate and intrastate traffic falling within  
17 the ambit of the ICA, even though the Commission certainly has no *independent* authority to  
18 regulate intercarrier dealings regarding interstate traffic. As applied to this case, that means that if  
19 the ICA does not address this traffic, then the Commission may not take action with respect to it.  
20 The Commission may, however, conclude that as a matter of contract interpretation, the language  
21 of the ICA that deals with "local" traffic applies to VNXX ISP-bound traffic as well. In that case,  
22 VNXX ISP-bound traffic would be subject to reciprocal compensation as a matter of contractual  
23 interpretation of the ICA, even if it were to be assumed that Section 251(b)(5) does not apply to it.

24 ***Resolution of the Dispute as a matter of law, Factual Disputes, Hearings, etc.***

25 These questions can be determined as matters of law based on briefing by the parties. There are no  
26

27 <sup>3</sup> See November 2008 Order at ¶¶ 6, 8.

1 material factual disputes surrounding any of these issues, and no hearings are necessary.

2 **II. VNXX ISP-BOUND TRAFFIC IS SUBJECT TO SECTION 251(b)(5).**

3 Level 3 recognizes that the interpretation of Section 251(b)(5) and, in particular, the scope  
4 of traffic to which it applies, has been subject to significant controversy and confusion over the  
5 years, specifically in the context of ISP-bound calls. However, that confusion was for all intents  
6 and purposes resolved by the FCC's *November 2008 Order*. That ruling makes clear that Section  
7 251(b)(5) applies to *all* traffic that two LECs exchange with each other, subject only to a narrow  
8 exception that does not apply here.

9 **A. The Evolution of the FCC's Construction of Section 251(b)(5).**

10 To understand the import of the *November 2008 Order*, a brief review of the evolution of  
11 the FCC's thinking on this issue over time is necessary.

12 The FCC originally (in 1996) thought that reciprocal compensation under Section 251(b)(5)  
13 was limited to "local" traffic, defined as traffic that begins and ends within a state-defined  
14 geographic local calling area.<sup>4</sup> Initially relying on that idea, the FCC ruled in 1999 that calls to  
15 ISPs were outside the scope of Section 251(b)(5). The FCC at that time reasoned that the fact that  
16 such calls were necessarily jurisdictionally interstate (because communications to and from the  
17 Internet are inherently interstate) made the calls not "local" within the meaning of the FCC's  
18 interpretation of Section 251(b)(5)<sup>5</sup>

19 The D.C. Circuit flatly rejected that reading of Section 251(b)(5). The court agreed that  
20 ISP-bound calls were inherently interstate, but found that the interstate character of the traffic was

24 <sup>4</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of  
25 1996, *First Report and Order*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") at ¶¶ 1033-  
35.

26 <sup>5</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of  
27 1996; Intercarrier Compensation for ISP-Bound Traffic, *Declaratory Ruling in CC Docket No. 96-  
98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, 14 FCC Rcd 3689 (1999) ("*1999  
ISP Ruling*").

1 completely unrelated to the policy and statutory questions necessary to determine if such traffic  
2 should be treated as “local” for purposes of intercarrier compensation.<sup>6</sup>

3 On remand, the FCC took the first steps towards integrating ISP-bound traffic within the  
4 Section 251(b)(5) regime, by backing away from its reliance on the “local” designation as relevant  
5 to reciprocal compensation.<sup>7</sup> Its reasoning, however, was muddled. The FCC recognized that  
6 Section 251(b)(5) was not limited to local calls, and found that Section 251(b)(5) would apply to  
7 ISP-bound calls *unless* some other factor prevented that result.<sup>8</sup> But the FCC (mistakenly, it turns  
8 out) thought that Section 251(g) had that effect. Section 251(g) is a statutory “grandfather”  
9 provision that preserves ILEC obligations regarding access services provided to interexchange  
10 carriers and information service providers that predated the 1996 Act. The FCC concluded that this  
11 grandfather provision not only applied to the LEC-to-LEC exchange of ISP-bound traffic, but that it  
12 had the effect of removing such traffic from the reach of Section 251(b)(5). But – having just  
13 concluded that Section 251(g)(5) did *not* apply to ISP-bound calls – the FCC ruled that such calls  
14 would be covered by a specially-created compensation regime, relying on the FCC’s general  
15 authority over interstate traffic established in Section 201. That compensation regime was  
16 generally parallel to, but outside of, the FCC’s rules and rulings regarding Section 251(b)(5).<sup>9</sup>

17 For purposes of the case presently before the Commission, the key FCC holding in the *ISP*  
18 *Remand Order* was that Section 251(b)(5) did *not* apply to ISP-bound traffic, due to the operation  
19 of Section 251(g). However, that key holding was flatly reversed by the D.C. Circuit, in May 2002,  
20

21  
22 <sup>6</sup> See *Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

23 <sup>7</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of  
24 1996; Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order,  
25 16 FCC Rcd 9151 (2001) (“*ISP Remand Order*”) at ¶¶ 45-46 (reliance on “local” designation as  
26 relevant to scope of Section 251(b)(5) was “mistaken”; part of purpose of ruling was to “correct”  
27 that error).

<sup>8</sup> *Id.* at ¶32.

<sup>9</sup> *Id.* at ¶¶ 77-94 (establishing separate compensation regime outside of Section 251(b)(5)).  
See *Verizon California v. Peevey, supra*, 462 F.3d at 1157-58 (9<sup>th</sup> Cir. 2006) (relying on FCC’s  
treatment of ISP-bound traffic as outside the scope of Section 251(b)(5) in affirming state  
regulator’s treatment of such traffic).

1 in the *WorldCom* case.<sup>10</sup> In *WorldCom*, the D.C. Circuit explained that the sole effect of Section  
2 251(g) was to preserve service and payment obligations that existed for ILECs and long distance  
3 carriers before the passage of the 1996 Act. It was only *after* the passage of the Act that the issue  
4 of LEC-to-LEC compensation arose at all – and certainly only after the Act that the issue of ISP-  
5 bound traffic arose at all – so the FCC was “precluded” from interpreting Section 251(g) as  
6 applying to ISP-bound traffic.<sup>11</sup>

7 Consider where things were in May 2002. The FCC had originally said that Section  
8 251(b)(5) only covered “local” traffic, but that ISP-bound traffic could not be considered “local.”  
9 The D.C. Circuit found that conclusion to be irrational and vacated it. Then the FCC said that  
10 Section 251(b)(5) was, actually, not limited to “local” traffic, which would suggest that ISP-bound  
11 traffic *was* covered. But in the same order the FCC said that ISP-bound traffic was *not* covered  
12 because it fell within a supposed “carve out” to Section 251(b)(5). But at the same time, even  
13 though (the FCC then thought) Section 251(b)(5) did not cover ISP-bound traffic, the FCC used its  
14 general authority over interstate traffic to require that ISP-bound traffic and “normal” Section  
15 251(b)(5) traffic be treated in essentially exactly parallel ways. So, the D.C. Circuit saw that *in*  
16 *practice* the FCC was saying that ISP-bound traffic should be treated *just like* Section 251(b)(5)  
17 traffic, even though it was not (in the FCC’s view) formally covered by Section 251(b)(5). That  
18 said, a critical component of the FCC’s new regime was that the FCC – not the states – got to set  
19 the compensation rates applicable to ISP-bound traffic, and it set rates much lower than the normal  
20 TELRIC-based rates that states had established for “normal” reciprocal compensation under  
21 Section 251(b)(5).

22 Confronted with this confusion/contradiction, the D.C. Circuit did not literally and legally  
23 “vacate” the *ISP Remand Order* in *WorldCom*. Instead, while it plainly ruled that the entire  
24

25 <sup>10</sup> *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

26 <sup>11</sup> *Id.*, 288 F.3d at 430. The 9<sup>th</sup> Circuit has recognized that, as a result of *WorldCom*,  
27 arguments attempting to limit intercarrier compensation based on the supposed operation of Section  
251(g) are impermissible. See *Pacific Bell v. PacWest*, 597 F.3d 1114, 1122-23, 1130 n.14, 1131  
(9<sup>th</sup> Cir. 2003).

1 “Section 251(g)” theory was wrong, it reversed that FCC ruling without vacating the FCC’s parallel  
2 compensation regime for ISP-bound traffic. It did so because it wanted the compensation regime to  
3 remain in place while the agency – pursuant to the court’s directive – articulated a valid legal  
4 rationale for its special compensation regime, with its special low rates, for compensation for ISP-  
5 bound traffic.<sup>12</sup>

6 *WorldCom* thus created a sort of legal limbo for intercarrier compensation for ISP-bound  
7 traffic. On the one hand, the FCC ruled in the *ISP Remand Order* that Section 251(b)(5) *would*  
8 *have* covered ISP-bound traffic, if not for Section 251(g). But the FCC also ruled that Section  
9 251(g) barred the application of Section 251(b)(5). The D.C. Circuit unequivocally held that *that*  
10 ruling was wrong. But the court also stated (equally clearly) that it was not vacating the FCC’s  
11 special compensation regime for ISP-bound traffic, because it thought that the FCC could justify  
12 that regime without doing violence to Section 251(b)(5).

13 The dispute about VNXX ISP-bound traffic at issue in the case before this Commission  
14 arose during this period of legal limbo. One interpretation of the legal situation was that the effect  
15 of the D.C. Circuit’s rejection of the “Section 251(g) theory” meant that Section 251(b)(5) in fact  
16 applied to all “telecommunications” – which would plainly cover both VNXX and other ISP-bound  
17 traffic.<sup>13</sup> But another possibility was that the only compensation system that existed for ISP-bound  
18 traffic *at all* at that time was the one the FCC set up in the *ISP Remand Order*. From this  
19 perspective, the question was not what Section 251(b)(5) covered; the question was the precise  
20 metes and bounds of what the FCC intended to do when it set up its special compensation regime.  
21 If the regime the FCC had established was not intended to cover VNXX ISP-bound traffic (as  
22 ILECs contended), then (at least until further FCC action), no compensation for such traffic was  
23 due. The result of these differing interpretations of the legal situation was several years of a mish-  
24

25 <sup>12</sup> *Id.*, 288 F.3d at 434.

26 <sup>13</sup> This is what the FCC itself said in the *ISP Remand Order* – Section 251(b)(5) applies to all  
27 telecommunications, including ISP-bound traffic, but for the operation of Section 251(g). With  
reliance on Section 251(g) “precluded” by the D.C. Circuit, it logically follows that Section  
251(b)(5) indeed applies.

1 mash of state commission and federal court rulings, while everyone waited for the FCC to re-think  
2 the issue, as called for by the D.C. Circuit's ruling in *WorldCom*.<sup>14</sup>

3 **B. The FCC Ruled In 2008 That Section 251(b)(5) Covers All ISP-Bound**  
4 **Traffic, Irrespective Of Whether Such Traffic Is "Local" Or Not.**

5 The legal limbo created by *WorldCom* was finally cleared up with the *November 2008*  
6 *Order*. In that order, the FCC articulated an interpretation of Section 251(b)(5) that – while it was  
7 largely consistent with the analysis it had begun back in 2001 – was broader, simpler, and clearer.  
8 The FCC's newly articulated understanding of Section 251(b)(5) finally provided the legal rationale  
9 for which the industry had been waiting since May 2002. That new understanding resolves the  
10 dispute in this case.

11 In November 2008, the FCC ruled plainly and unequivocally that the normal reciprocal  
12 compensation regime of Section 251(b)(5) applies to ISP-bound calls.<sup>15</sup> It concluded without  
13 qualification that "the scope of Section 251(b)(5) is broad enough to encompass ISP-bound traffic."  
14 *Id.* at ¶ 7. It did not reach that conclusion by limiting Section 251(b)(5) to "local" traffic – a  
15 construction of the statute it had already rejected back in 2001 – and then determining that some  
16 particular sub-class of ISP-bound traffic was "local." To the contrary, it reaffirmed what it had  
17

18 <sup>14</sup> Things were particularly complicated because in the *ISP Remand Order* the FCC had  
19 clearly stated (correctly) that all ISP-bound traffic was jurisdictionally interstate and (incorrectly)  
20 that Section 251(b)(5) did not apply to it. *ISP Remand Order* at ¶¶ 34, 35. However, the only way  
21 that state regulators such as this Commission acquire jurisdiction to act with respect to interstate  
22 traffic is through their responsibility under Sections 251 and 252 to arbitrate, approve, and enforce  
23 interconnection agreements. As a result, the FCC's conclusion that ISP-bound traffic was not  
24 covered by Section 251(b)(5) had the legal effect of stripping state regulators of the authority to set  
25 compensation rules for this traffic, as the FCC expressly stated: "Because we now exercise our  
26 authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound  
27 traffic, however, *state commissions will no longer have authority to address this issue.*" *ISP*  
*Remand Order* at ¶ 82 (emphasis added). But notwithstanding this plain directive for states to  
leave the issue alone, the FCC's dithering in response to the *WorldCom* ruling, combined with  
continuing CLEC-ILEC disputes about it, created a vacuum that state regulators were effectively  
compelled to fill. One legal benefit of the FCC's *November 2008 Ruling* is that, by bringing all  
ISP-bound traffic within the scope of Section 251(b)(5), state commission authority to deal with it  
– in a manner consistent with federal law (see 47 U.S.C. § 252(c)) – is now clear. See *infra*.

<sup>15</sup> *November 2008 Order*.

1 originally said in 2001, that “the better view is that Section 251(b)(5) is not limited to local traffic.”  
2 *Id.*

3 That clear and unequivocal ruling is sufficient by itself to resolve the dispute presently  
4 before the Commission. The only reason that one might think that VNXX ISP-bound traffic might  
5 not be covered by Section 251(b)(5) is that the traffic is not really “local” because the ISP is not  
6 physically in the caller’s originating calling area. But that only matters if Section 251(b)(5) is  
7 limited to local traffic. The FCC made crystal clear that no such limitation exists on the reach of  
8 Section 251(b)(5).

9 We also know that Section 251(g) does limit the scope of LEC-to-LEC intercarrier  
10 compensation – including intercarrier compensation for ISP-bound traffic. The D.C. Circuit made  
11 clear in *WorldCom* that, even assuming that Section 251(g) limits Section 251(b)(5), it *only* applies  
12 to an ILEC’s interactions with an interexchange carrier (or an information service provider), and  
13 *only* applies to compensation arrangements that existed prior to the passage of the 1996 Act.<sup>16</sup>  
14 LEC-to-LEC intercarrier compensation obligations did not exist prior to the 1996 Act. Intercarrier  
15 compensation obligations for ISP-bound traffic did not exist prior to the 1996 Act. VNXX traffic  
16 (ISP-bound or otherwise) did not exist prior to the 1996 Act. While the FCC concluded that  
17 Section 251(b)(5) indeed does not apply to the limited, pre-1996-Act situations covered by Section  
18 251(g), LEC-to-LEC compensation arrangements for VNXX ISP-bound traffic did not exist prior to  
19 the 1996 Act, so Section 251(g) does not affect them.

20 The point is that in the *November 2008 Order*, the FCC adopted an extremely broad  
21 interpretation of the scope of Section 251(b)(5) – more than broad enough to cover VNXX ISP-  
22 bound traffic. Paragraph 8 eliminates any doubt on that score:

23 We begin by looking at the text of the statute. Section 251(b)(5) imposes on all  
24 LECs the “duty to establish reciprocal compensation arrangements for the transport  
25 and termination of telecommunications.” The Act broadly defines  
26

27 <sup>16</sup> *WorldCom*, 288 F.3d 433.

1 “telecommunications” as “the transmission, between or among points specified by  
2 the user, of information of the user’s choosing, without change in the form or  
3 content of the information as sent and received.” *Its scope is not limited*  
4 *geographically* (“local,” “intrastate,” or “interstate”) *or to particular services*  
5 (“telephone exchange service,” telephone toll service,” or “exchange access”). We  
6 find that the traffic we elect to bring within this framework fits squarely within the  
7 meaning of “telecommunications.” We also observe that *had Congress intended to*  
8 *251(b)(5) framework, it could have easily done so by incorporating restrictive*  
9 *terms in section 251(b)(5). Because Congress used the term*  
10 *“telecommunications,” the broadest of the statute’s defined terms, we conclude*  
11 *that section 251(b)(5) is not limited only to the transport and termination of*  
12 *certain types of telecommunications traffic, such as local traffic.*

13 November 2008 Order at ¶ 8 (emphasis added, footnotes omitted).

14  
15 In light of this ruling, there is simply no basis to conclude that Section 251(b)(5) does not  
16 extend to VNXX ISP-bound traffic. That traffic is covered, and reciprocal compensation therefore  
17 applies to it. We will not, in this initial brief, speculate as to what Qwest might raise in support of  
18 its apparent view that such a limitation does exist on Section 251(b)(5). Instead, we will respond to  
19 any such claims in our reply.

20 **C. The Legal Analysis Laid Out In The November 2008 Order Governs**  
21 **This Case.**

22 In May 2002 the D.C. Circuit had established an obligation on the FCC to articulate a legal  
23 rationale for the intercarrier compensation regime for ISP-bound traffic that had been in place since  
24 2001 – that is, to articulate a rationale for the very regime that the parties in effect incorporated into  
25 their contract by means of the disputed amendment language that underlies this case. Obviously,  
26 that regime must be interpreted and understood in light of the legal rationale that the FCC in fact  
27 ultimately supplied. The Ninth Circuit also is very clear that the law to be applied in deciding a

1 matter arising under the 1996 Act is the law that exists at the time of the decision.<sup>17</sup> Therefore, the  
2 construction of Section 251(b)(5) articulated by the FCC in the *November 2008 Order* is the  
3 construction that governs for purposes of this case.<sup>18</sup>

4 In *Global NAPs*,<sup>19</sup> the First Circuit held that the *November 2008 Order* did not “preempt”  
5 state authority to impose intrastate access charges on VNXX calls to ISPs. The basis for the ruling  
6 was twofold. First, the standard for federal “preemption” of state authority is fairly stringent, and  
7 the CLEC in that case evidently failed to show that the standard had been met. Second, the First  
8 Circuit had earlier concluded that the FCC’s special “non-Section 251(b)(5)” compensation  
9 mechanism for ISP-bound traffic, established in the 2001 *ISP Remand Order*, did not cover VNXX  
10 traffic. The court apparently viewed the *November 2008 Ruling* as doing nothing more than giving  
11 a new legal justification for the FCC’s non-Section-251(b)(5) regime. But in fact the FCC’s  
12 objective in the *November 2008 Order* was to explain why the FCC – rather than the states – had  
13 the legal authority to set rates for intercarrier compensation for ISP-bound traffic. The FCC’s  
14 ultimate reason was that the enactment of Section 251(b)(5) did not supplant its pre-existing  
15 authority (under Section 201) over interstate traffic, and that its Section 201 authority allowed it –  
16 not the states – to establish the intercarrier compensation rules for such traffic.

17 The *Global NAPs* case was wrongly decided. First, in establishing or interpreting the terms  
18 of an interconnection agreement, the question is not “preemption” of state authority. State  
19 authority to take, establish, and interpret interconnection agreements arises from federal law, and  
20 Section 252(c) directly obliges state regulators to follow federal law when they do so. The First  
21

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22 <sup>17</sup> *US WEST v. Jennings*, 304 F.3d 950 (9th Cir. 2002); *see also Sw. Bell Tel. Co. v Brooks*  
23 *Fiber Communications of Okla., Inc.*, 235 F.3d 493, 499 (10<sup>th</sup> Cir. 2000); *Sw. Bell Tel. Co. v. Pub.*  
24 *Util. Comm’n of Tex.*, 208 F. 3d 475, 482 (5<sup>th</sup> Cir. 2000). As the 9<sup>th</sup> Circuit stated in *Pacific Bell v.*  
25 *PacWest, supra*: “if any ruling or directive ... issued by the FCC after the [state regulator] issued its  
26 decision rendered [those] decisions violative of the Act, we would apply the new regulations and  
27 invalidate the [state regulator’s] orders.” 597 F.3d at 1130 n.14.

<sup>18</sup> If nothing else, *US WEST v. Jennings* means that if this Commission were to *fail* to apply  
the FCC’s current construction of Section 251(b)(5) in this case, on review the federal courts would  
do so. It would be absurd to suggest that this Commission should waste its time by rendering a  
decision that ignores current law in the face of the knowledge that the courts will apply it.

<sup>19</sup> *Global NAPs, Inc. v. Verizon New England, Inc.*, 603 F.3d 71 (1<sup>st</sup> Cir. 2010).

1 Circuit failed to appreciate this point, leading it to permit a state (there, Massachusetts) to deviate  
2 from federal law. Second, the First Circuit appears to have misunderstood what the FCC did in the  
3 *November 2008 Order*. The First Circuit thought that in 2001 the FCC had established a “non-  
4 Section-251(b)(5)” compensation regime that was limited to “local” ISP-bound traffic, and that the  
5 *November 2008 Order* was crafting a new justification for that “non-Section-251(b)(5)” regime.  
6 To the contrary, the *November 2008 Order* reflects a complete rethinking by the agency of the  
7 scope of one of the statutes the agency is responsible for implementing – Section 251(b)(5). The  
8 agency’s new legal reasoning is broader than its approach from 2001, and must be given  
9 appropriate deference on its own terms.

10 In this regard, it appears that the First Circuit fell into essentially the same error that  
11 resulted in the Supreme Court’s reversal of the Ninth Circuit in the *Brand X* case.<sup>20</sup> In *Brand X*, the  
12 Ninth Circuit decided that the delivery of cable modem service necessarily included a  
13 “telecommunications service” component. When the FCC addressed that question and reached a  
14 different result, the Ninth Circuit chose not to defer to the FCC’s reading of the applicable sections  
15 of the Communications Act, in light of the court’s own previous interpretation of those terms. The  
16 Supreme Court reversed, holding that even where a court of appeals has interpreted a statute in the  
17 past, it still must defer to a different interpretation later advanced by the agency Congress has  
18 charged with implementing that statute. In *Global NAPs*, it appears that the First Circuit – having  
19 previously concluded (based on the FCC’s original rulings) that the FCC’s rules for compensation  
20 for ISP-bound traffic applied only to “local” ISP-bound traffic – failed to defer to the FCC’s new  
21 reasoning that clearly does not contain any such limitation.

22 In light of this error by the First Circuit, reliance on the *Global NAPs* case here in the Ninth  
23 Circuit would be misguided.

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<sup>20</sup> *National Cable Television Association v. Brand X Internet Services*, 545 U.S. 967 (2005).

1 The FCC has now clearly ruled that Section 251(b)(5) applies to ISP-bound traffic, and that  
2 the statute's reciprocal compensation obligation is not limited to geographically local calls. The  
3 courts have also ruled that Section 251(g), on which the FCC previously relied to limit the reach of  
4 Section 251(b)(5), does not apply to compensation for LEC-to-LEC traffic or for ISP-bound traffic  
5 because there were no compensation obligations for such traffic at the time of the 1996 Act. It  
6 follows that the legal regime governing intercarrier compensation for ISP-bound traffic applicable  
7 at least from the time of the *WorldCom* case in 2002 includes VNXX ISP-bound traffic, and this  
8 Commission should so rule.

9 **III. EVEN IF VNXX ISP-BOUND TRAFFIC IS NOT SUBJECT TO SECTION 251(b)(5),**  
10 **THE COMMISSION CAN AND SHOULD RULE THAT IT IS SUBJECT TO**  
11 **COMPENSATION UNDER THE TERMS OF THE PARTIES' ICA.**

12 For the above reasons, VNXX ISP-bound traffic is now, and for the period relevant to this  
13 dispute has been, subject to the compensation requirements of Section 251(b)(5). However, if the  
14 Commission were to reach the opposite conclusion, compensation for this traffic is still due, as the  
15 Commission originally ruled in this matter, under the terms of the parties' ICA.

16 It bears emphasis at the outset that going down this legal avenue raises significant  
17 jurisdictional questions for the Commission. Of course, all ISP-bound traffic is jurisdictionally  
18 interstate in nature, that is, under the regulatory authority of the FCC, not the states. The FCC  
19 expressly asserted this jurisdiction in its original 1999 ruling on dial-up ISP-bound traffic,<sup>21</sup> and the  
20 D.C. Circuit did not question that aspect of its ruling on appeal.<sup>22</sup> Then, in the 2001 *ISP Remand*  
21 *Order*, the FCC again asserted complete and exclusive federal jurisdiction over ISP-bound traffic<sup>23</sup>  
22 – going so far as to state affirmatively that “state commissions ... no longer have authority to  
23 address this issue.”<sup>24</sup> And in the *November 2008 Order*, the FCC did not retreat from its view –

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25  
26 <sup>21</sup> *1999 ISP Ruling, supra*  
27 <sup>22</sup> *Bell Atlantic v. FCC*, 206 F.3d at 5.  
<sup>23</sup> *ISP Remand Order* at ¶ 55.  
<sup>24</sup> *Id.* at ¶ 82.

1 now established law for more than a decade – that all ISP-bound calls are interstate, not intrastate,  
2 in nature.

3 In these circumstances, an obvious question arises as to how this Commission can deal with  
4 this traffic – and intercarrier compensation for it – at all. If the Commission acknowledges that – as  
5 a result of the *November 2008 Order* – all ISP-bound traffic is subject to Section 251(b)(5), the  
6 jurisdictional problem disappears. State commissions clearly have the authority to arbitrate,  
7 approve, and enforce ICAs under Sections 251 and 252, even though ICAs can and typically do  
8 deal with both interstate and intrastate matters.<sup>25</sup> So if – as Level 3 submits is the case – VNXX  
9 ISP-bound traffic is subject to Section 251(b)(5), there can be no question as to the Commission’s  
10 authority to act.

11 However, if it is assumed that Section 251(b)(5) does *not* apply to this traffic because the  
12 traffic is entirely interstate, the Commission has no authority to address it at all – *unless* the traffic  
13 is covered by the terms of the parties’ ICA. If the traffic is covered by the ICA, then the  
14 Commission’s authority to interpret and enforce ICAs that it has approved would extend to this  
15 traffic as well.

16 If it is assumed – erroneously – that Section 251(b)(5) does not cover VNXX ISP-bound  
17 traffic, the Commission effectively has two choices. First, the Commission can conclude that the  
18 ICA does not cover this traffic either. In that case, the Commission simply has no authority to take  
19 any action with respect to it at all. Second, the Commission can conclude that the ICA does cover  
20 it, in which case the Commission can enforce the ICA. What the Commission may not do is  
21 exercise its state-created authority over intrastate matters to establish a compensation scheme for  
22 this traffic outside the purview of the ICA.

23 The relevant language in Level 3’s ICA with Qwest states that reciprocal compensation  
24 applies to “all EAS/local (§251(b)(5)) and ISP-bound traffic (as that term is used in the FCC ISP  
25

26  
27 <sup>25</sup> See *Local Competition Order, supra* at ¶ 24. (noting that states deal with certain interstate issues, and the FCC deals with certain intrastate issues, under the 1996 Act).

1 Order).<sup>26</sup> The federal district court ruled that VNXX ISP-bound traffic did not fall within the  
2 “interim” compensation regime for compensation of ISP-bound traffic that the FCC established in  
3 the *ISP Remand Order*.<sup>27</sup> That means that the Commission’s sole jurisdictional “hook” over this  
4 traffic – again, on the erroneous assumption that Section 251(b)(5) does not cover it – is to rule that  
5 the traffic falls within the scope of “all EAS/local” traffic within the meaning of the parties’ ICA.<sup>28</sup>

6 There is no dispute in this case as to how VNXX works. A CLEC providing VNXX service  
7 assigns a customer (here, an ISP) a telephone number that is “local” to certain ILEC end users even  
8 though the customer is not physically located in the local region associated with the assigned  
9 VNXX number. The result is a hybrid form of traffic. The end user dials calls to the VNXX  
10 customer as local calls. The end user is billed for these calls as local calls. The ILEC delivers the

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11  
12 <sup>26</sup> Level 3 and Qwest began exchanging ISP-bound traffic in Arizona in September 2000, pursuant  
13 to the Parties’ original interconnection agreement. Following an arbitration, the Commission  
14 approved an Interconnection Agreement in January 2002. Thereafter, in February 2003, the  
15 Commission approved, by operation of law, the Parties’ Internet Service Provider (“ISP”) Bound  
16 Traffic Amendment (“*ISP Amendment*”). The relevant provisions are located in Section 2 of the  
17 *ISP Amendment*.

18 <sup>27</sup> District Court March 6 2008 Order, slip op. at 20-21. Level 3 obviously disagrees with this  
19 ruling, but recognizes that the rating may not literally be re-litigated before the Commission at this  
20 juncture. Obviously, however, the scope of the *FCC’s interim regime* established in the *ISP*  
21 *Remand Order* has no bearing on the impact of the FCC’s *November 2008 Order*, which – in  
22 response to the D.C. Circuit’s holding in *WorldCom* – provided a straightforward and expansive  
23 gloss on Section 251(b)(5) itself. That is, the fact that the court found that the FCC’s non-Section-  
24 251(b)(5) compensation regime did not embrace VNXX ISP-bound traffic has no effect whatsoever  
25 on the FCC’s (new) understanding of the scope of Section 251(b)(5) itself. The different  
26 perspectives can be seen clearly by juxtaposing the court’s statement in its ruling against the FCC’s  
27 statement in the *November 2008 Order*:

28 “The Court has determined that the FCC intended to remove ISP-bound traffic from the  
29 confines of §251(b)(5) ...” (slip. Op. at 20)

30 “As an initial matter, we conclude that the scope of section 251(b)(5) is broad enough to  
31 encompass ISP-bound traffic” (*November 2008 Order* at ¶ 7).

32 Part of the task facing the Commission at this juncture, consistent with *US West v. Jennings*,  
33 *supra*, and *Pacific Bell v. Pac West, supra*, is to give full effect to the FCC’s current understanding  
34 of Section 251(b)(5), which necessarily relates back at least to the D.C. Circuit’s ruling in  
35 *WorldCom* calling for the FCC to state that understanding.

36 <sup>28</sup> See also District Court March 6, 2008 Order ruling, slip op. at 22-23 (suggesting that the  
37 Commission is empowered to find that VNXX ISP-bound traffic is local in nature).

1 calls to the CLEC at a LATA-wide point of interconnection, in exactly the same manner as applies  
2 to purely, geographically local ILEC-to-CLEC calls. The only difference is that once the CLEC  
3 gets the call, it does not (as it would with a pure "local" call) bring the call back to the originating  
4 local calling area; instead, it delivers the call to its customer in a distant location.<sup>29</sup> The question  
5 for the Commission is simply whether the overwhelmingly "local" character of the traffic as  
6 experienced by the end user, and as reflected in the actual routing of the calls both by the ILEC and  
7 in the ILEC-CLEC interconnection architecture, is somehow trumped by the fact that the CLEC  
8 does not haul the traffic back to the originating calling area.

9 The most sensible answer is to deem this traffic to be "local" within the meaning of the  
10 parties' ICA. In this regard, the question of the proper characterization of this traffic is similar to  
11 that addressed by the D.C. Circuit in *Bell Atlantic v. FCC*. There the court vacated the FCC's  
12 conclusion that ISP-bound calls were not "local" for purposes of intercarrier compensation, because  
13 the FCC had failed to assess the question of "locality" from the perspective of the purposes of  
14 intercarrier compensation. As the D.C. Circuit put it, the FCC in that case had failed to analyze  
15 "whether a call to an ISP should fit within the local call model of two collaborating LECs or the  
16 long-distance model of a long-distance carrier collaborating with two LECs."<sup>30</sup> Despite the fact  
17 that in a VNXX arrangement the called party is not physically located in the calling party's local  
18 calling zone, VNXX calls fit much more closely "within the local call model of two collaborating  
19 LECs" than such calls might fit within "the long distance model of a long-distance carrier  
20 collaborating with two LECs." There is no "long distance carrier" involved in VNXX calls. These  
21 calls are not dialed on a 1+ basis, and there are no toll charges associated with them. VNXX calls  
22 are, at bottom, a particular form of local LEC-to-LEC calling.

23 For these reasons, if the Commission were to conclude that Section 251(b)(5) does not  
24 reach VNXX ISP-bound calls, it should nonetheless rule that such calls are properly viewed as  
25

26 <sup>29</sup> See District Court March 6, 2008 Order at 6-8 (describing VNXX arrangements); *Verizon*  
27 *California, Inc. v. Peevey*, 462 F. 3d 1142, 1147-48 (9<sup>th</sup> Cir. 2006) (same).

<sup>30</sup> *Bell Atlantic v. FCC*, 206 F.3d at 5.

1 “EAS/local” traffic within the meaning of the parties’ ICA, and reaffirm Qwest’s obligation to  
2 compensate Level 3 for these calls.<sup>31</sup>

3 **IV. THERE IS NO NEED FOR A HEARING.**

4 There is no need for an evidentiary hearing in this matter.

5 First, the meaning and impact of the FCC’s *November 2008 Order* are purely questions of  
6 law. Specifically, the FCC has ruled that Section 251(b)(5) is not limited to “local” traffic and is  
7 without question broad enough to cover ISP-bound traffic. It is hard to imagine any *factual* issues  
8 that would affect the application of that Order to the present case.

9 Second, there are no open factual issues about how VNXX calling works or what the  
10 parties’ ICA provides. Assuming that the Commission were to find that Section 251(b)(5) does not  
11 cover VNXX ISP-bound traffic, the only question would be the purely legal one of whether such  
12 traffic falls within the scope of traffic addressed by the “EAS/local” language in the parties’ ICA.  
13 If it does, then the Commission would necessarily reaffirm its original ruling that compensation is  
14 due for this traffic. If it does not, then the Commission as a matter of law has no jurisdiction to  
15 address it, because it is purely interstate and – as we are assuming here *arguendo* – it is not  
16 addressed in an ICA. Again, these are purely legal matters, with no disputed factual component.

17 **V. CONCLUSION.**

18 The FCC’s *November 2008 Order* establishes that all ISP-bound traffic is subject to Section  
19 251(b)(5). Nothing in either the text of that order or the logic of the FCC’s newly announced gloss  
20 on Section 251(b)(5) provides any possible basis for excluding VNXX ISP-bound traffic from the  
21 reach of the statute. It follows that Qwest owes Level 3 compensation for VNXX ISP-bound traffic  
22 in accordance with the FCC’s special compensation rates established for that traffic. Alternatively,  
23

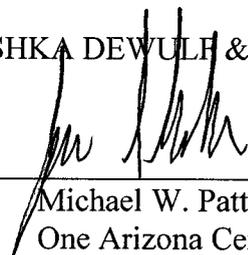
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24 <sup>31</sup> In this regard, while VNXX calls are not strictly a form of “EAS” service, they are, in  
25 practical effect, a variant of such service. Extended Area Service is an arrangement in which a  
26 customer in a particular local calling area is permitted to dial calls that would “normally” be a toll  
27 call on the ILEC’s network using local dialing patterns and at local calling rates. A VNXX  
arrangement accomplishes the same result – a locally-dialed call that is physically completed  
outside the originating caller’s local calling area. For this reason as well, it is reasonable for the  
Commission to treat VNXX calls as falling within the contractual term “EAS/local” traffic.

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1 the Commission may conclude that VNXX ISP-bound traffic falls within the meaning of the term  
2 "EAS/local" traffic used in the parties' ICA and reaffirm that compensation is due on that basis.  
3 However, the Commission may not (a) rule that VNXX ISP-bound traffic is not subject to Section  
4 251(b)(5), (b) rule that this traffic is not covered by the terms in the parties' ICA, or (c) establish  
5 some freestanding compensation mechanism for it. This limit on the Commission arises because,  
6 without question, VNXX ISP-bound traffic is jurisdictionally interstate, and the Section 251/252  
7 interconnection process is the only basis on which the Commission could acquire jurisdiction over  
8 it.

9 RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of October 2010.

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