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Arizona Corporation Commission

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PAC-WEST TELECOMM, INC.

Complainant,

v.

QWEST CORPORATION,

Respondent.

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

LEVEL 3 COMMUNICATIONS, LLC,

Complainant,

v.

QWEST CORPORATION,

Respondent.

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

**INITIAL BRIEF AND PROCEUDRAL  
RECOMMENDATIONS OF QWEST  
CORPORATION**

Qwest Corporation ("Qwest") submits this memorandum pursuant to the August 25, 2008 procedural order issued by the Arizona Corporation Commission (the "Commission"). In this memorandum, Qwest recommends that the Commission set a discovery schedule to permit discovery concerning how Level 3 Communications, LLC ("Level 3") and Pac-West Telecomm, Inc. ("Pac-West") provide service using VNXX in Arizona. Discovery is necessary to establish the facts that determine the regulatory treatment of VNXX ISP traffic during the relevant time period. After discovery, the Parties may be able to stipulate to the pertinent facts, or ask for an evidentiary hearing in

1 this matter if necessary.

## 2 INTRODUCTION

3  
4 This proceeding is a remand from the United States District Court for the District  
5 of Arizona of decisions rendered by the Commission in two separate complaint cases  
6 filed by Level 3 Level and Pac-West Telecomm, Inc. In its decision dated March 6,  
7 2008, the District Court determined that the FCC's *ISP Remand Order*<sup>1</sup> prescribed  
8 intercarrier compensation only for calls delivered to an Internet Service Provider ("ISP")  
9 located in the caller's local calling area. The District Court recognized that VNXX ISP  
10 traffic, by definition, involves an ISP located outside of the caller's local calling area.  
11 Accordingly, the District Court remanded this matter back to the Commission to  
12 determine how VNXX ISP traffic is treated for intercarrier compensation purposes under  
13 applicable federal and state law.

14 After the District Court's decision, Level 3 and Pac-West took different routes.  
15 Level 3 appealed the District Court's ruling to the Ninth Circuit Court of Appeals. The  
16 Ninth Circuit dismissed Level 3's appeal on March 26, 2010 on the grounds that it was  
17 not ripe. While Level 3 was pursuing its Ninth Circuit appeal, Pac-West chose to  
18 proceed before the Commission. After the FCC issued its *ISP Mandamus Order*<sup>2</sup> on  
19 November 5, 2008, Pac-West moved for summary determination claiming erroneously  
20 that the *ISP Mandamus Order* held that all ISP traffic was subject to reciprocal  
21 compensation. In a procedural order dated September 17, 2009, the Commission denied  
22 Pac-West's motion for summary determination on the ground that there were "issues of

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23 <sup>1</sup> Order on Remand and Report and Order, *In the Matter of implementation of the Local*  
24 *Competition Provisions in the Telecommunications Act of 1996; Intercarrier*  
25 *Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (Rel. April 27, 2001)("ISP  
26 *Remand Order*").

<sup>2</sup> Order on Remand, *In the Matter High-Cost Universal Service Support*, 24 FCC Rcd  
6475 (Rel. November 5, 2008)("ISP Mandamus Order").

1 fact concerning, at a minimum, how Pac-West provided service using VNXX...”

2 In its procedural order dated August 25, 2008, the Commission directed that the  
3 parties brief certain issues including whether VNXX ISP-bound traffic was subject to  
4 reciprocal compensation under Section 251(b)(5) at the time relevant to the dispute  
5 arising from the ISP Amendment to the Level 3 and Pac-West ICAs. The time periods  
6 relevant for this dispute are slightly different for Level 3 and Pac-West. The term of the  
7 ISP Amendment for Level 3 at issue in this proceeding ended on January 17, 2007 when  
8 Level 3’s new arbitrated agreement became effective. The term of the ISP Amendment  
9 for Pac-West expired on March 22, 2008 when Pac-West’s opt-in to the arbitrated Level  
10 3 interconnection agreement became effective. Both ISP Amendments had terminated  
11 before the *ISP Mandamus Order* was issued in November of 2008.

## 12 ARGUMENT

### 13 I. VNXX ISP Traffic Was Not Subject To Reciprocal Compensation Under 14 the Level 3 and Pac-West ISP Amendments At Any Time Relevant to this 15 Dispute

16 VNXX ISP traffic was not subject to reciprocal compensation under Section  
17 251(b)(5) at the time relevant to the dispute arising from the Level 3 and Pac-West ISP  
18 Amendments, or at any other time for that matter. Under both the *ISP Remand Order* and  
19 the *ISP Mandamus Order*, there are two intercarrier compensation regimes that apply to  
20 calls to ISPs. The applicability of these regimes turns on the location of the ISP in  
21 relation to the calling party. For calls placed to ISPs located within the caller’s local  
22 calling area, the *ISP Remand Order* compensation scheme applies. That was one of the  
23 holdings of the District Court’s decision. For calls placed to ISPs located outside of the  
24 caller’s local calling area including specifically VNXX ISP traffic, the FCC’s access  
25 charge rules apply. Under the FCC’s access charge rules, an ISP is treated as an end user  
26 “for the purpose of applying access charges.”<sup>3</sup> Where the caller and the ISP are both

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<sup>3</sup> *ISP Remand Order*, ¶11 (emphasis added).

1 located in the same state, this rule brings into play the applicable intrastate rules,  
2 including exceptions to access charges that might apply in a particular state.

3 **A. VNXX ISP Traffic is Interexchange traffic that is not subject to**  
4 **Reciprocal Compensation**

5 In the *ISP Remand order*, the FCC determined that traffic encompassed by the  
6 interstate or intrastate access charge regimes applicable to interexchange traffic is not  
7 subject to reciprocal compensation. In the *ISP Remand Order*, the FCC stated:

8 Before Congress enacted the 1996 Act, LECs provided access  
9 services to IXCs and to information service providers in order  
10 to connect calls that travel to points - *both interstate and*  
11 *intrastate* - beyond the local exchange. *In turn, both the*  
12 *Commission and the states had in place access regimes*  
13 *applicable to this traffic, which they have continued to modify*  
14 *over time. It makes sense that Congress did not intend to*  
15 *disrupt these pre-existing relationships. Accordingly,*  
16 *Congress excluded all such access traffic from the purview of*  
17 *section 251(b)(5).*<sup>4</sup> (Citations omitted)

18 In addition, the FCC held that “traffic subject to parallel intrastate access  
19 regulations” is also excluded from the scope of section 251(b)(5).<sup>5</sup> While the FCC’s  
20 reliance upon Section 251(g) was new, its conclusion that interexchange traffic is not  
21 subject to reciprocal compensation was not new. In its *Local Competition Order*, the  
22 FCC had found that “the reciprocal compensation provisions of Section 251(b)(5) for  
23 transport and termination of traffic do not apply to the transport or termination of  
24 interstate or intrastate interexchange traffic.”<sup>6</sup>

25 The FCC reaffirmed the determinations it made in the *ISP Remand Order* in the  
26 *2008 ISP Mandamus Order*:

23 \_\_\_\_\_  
24 <sup>4</sup> *ISP Remand Order* ¶ 37 (emphasis added).

25 <sup>5</sup> *Id.*, at n. 66.

26 <sup>6</sup> First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶1034 (Rel. August 8, 1996)(“*Local Competition Order*”).

1 [W]e agree with the finding in the ISP Remand Order that  
2 traffic encompassed by section 251(g) is excluded from  
3 section 251(b)(5) *except to the extent that the Commission*  
4 *acts to bring that traffic within its scope.* Section 251(g)  
preserved the pre-1996 Act regulatory *regime* that applies to  
access traffic,<sup>7</sup> *including rules governing 'receipt of*  
*compensation.'*<sup>7</sup>

5 Under Section 251(g), the regulations, orders and policies of the FCC applicable to  
6 “exchange access, information access and exchange services for such access” are  
7 preserved under Section 251(g) of the Act until they “are explicitly superseded by  
8 regulations” prescribed by the FCC.<sup>8</sup>

9 Under the FCC’s pre-Act rule known as the ESP Exemption, an ISP is treated as  
10 an end user for purposes of applying access charges.<sup>9</sup> Under this rule, an ISP is treated  
11 just like any other end user.<sup>10</sup> “Rather than directly exempting ESPs from interstate  
12 access charges, the [FCC] defined them as ‘end users’—no different from a local pizzeria  
13 or barber shop.”<sup>11</sup> The FCC’s rules do not distinguish between ESPs and other end  
14 users.<sup>12</sup>

15 The VNXX traffic at issue in this proceeding is interexchange traffic governed by  
16 federal and state access charge regimes. The pre-Act rules, orders and policies of the  
17 FCC provide that the carrier (or carriers) that originate calls that are delivered to an ISP  
18 point of presence (“POP”) located outside of the caller’s local calling area are to be

19 <sup>7</sup> *ISP Mandamus Order* ¶ 16 (emphasis added).

20 <sup>8</sup> *See Competitive Telecommunications Association v. FCC*, 117 F.3d 1068, 1073 (8<sup>th</sup> Cir.  
21 1997) (“*CompTel*”), an appeal from the FCC’s *Local Competition Order*. In *CompTel*,  
22 the Eighth Circuit held that under Section 251(g) of the Act, “LECs will continue to  
provide exchange access to IXC’s for long-distance service, and continue to receive  
payment, under the pre-Act regulations and rates.”

23 <sup>9</sup> *ISP Remand Order*, ¶11.

24 <sup>10</sup> *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 409 (D.C. Cir. 2002).

25 <sup>11</sup> *Id.*

26 <sup>12</sup> Notice of Proposed Rulemaking, *In the Matter of Amendments of Part 69 of the*  
*Commission’s Rules Relating to the Creation of Access Charge Subelements for Open*  
*Network Architecture*, 4 FCC Rcd 3983, ¶42, n. 92 (Rel., May 9, 1989).

1 compensated by the interexchange carrier (“IXC”) who provides the interexchange  
2 service. In this case, Level 3 and Pac-West are interexchange carriers because they  
3 employ VNXX arrangements to create a toll free interexchange service for their ISP  
4 customers.<sup>13</sup>

5 Level 3 and Pac-West engage in VNXX so that customers of the ISPs that they  
6 serve do not have to place toll calls in order to reach their ISP.<sup>14</sup> VNXX traffic is  
7 interexchange traffic because it involves calls that are placed by a caller in one local  
8 calling area and delivered to an ISP modem/server (or POP) located in a different local  
9 calling area. Under federal law, state commissions have authority to define local calling  
10 areas in their respective states.<sup>15</sup> In Arizona, the Commission has determined that the  
11 ILEC’s geographic local calling areas will be used for intercarrier compensation  
12 purposes.<sup>16</sup> Thus, calls that originate and terminate in different local calling areas are  
13 interexchange calls subject to applicable pre-Act access charge rules, regardless of the  
14 dialing pattern for these calls.<sup>17</sup>

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16 <sup>13</sup> *Petition of Global NAPs, Inc. for Arbitration Pursuant to §252(b) of the*  
17 *Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon*  
18 *New England*, Docket No. 6742, 2002 Vt. PUC LEXIS 272, at \*41-\*42 (Vt. PSB 2002)  
19 (“In effect, a CLEC using VNXX offers the equivalent of incoming 1-800 service,  
20 without having to pay any of the costs associated with deploying that service and instead  
21 relying upon [the ILEC] to transport the traffic without charge simply because the VNXX  
22 says the call is ‘local.’”).

21 <sup>14</sup> *Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 102-103 (2nd Cir. 2006)  
22 (“*Global Naps II*”).

22 <sup>15</sup> *Local Competition Order* ¶ 1035.

23 <sup>16</sup> A.C.C. R14-2-1305(A).

23 <sup>17</sup> *See, e.g., Order Ruling on Arbitration, In re Petition of MCI Metro Transmission*  
24 *Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement*  
25 *with Horry Telephone Cooperative*, 2006 S.C. PUC LEXIS 2, at \*35 (S.C. PUC, January  
26 11, 2006) (“The Commission’s and the FCC’s current intercarrier compensation rules for  
wireline calls clearly exclude interexchange calls from both reciprocal compensation and  
ISP intercarrier compensation. These calls are subject to access charges. This is also the  
case for Virtual NXX calls, which are no different from standard dialed long distance toll  
or 1-800 calls.”).

1                   **B.     The FCC’s Recent 2008 *ISP Mandamus Order* Did Not**  
2                   **Retroactively Subject VNXX ISP Traffic to Reciprocal**  
3                   **Compensation under Section 251(b)(5)**

4                   After the District Court rendered its decision, two judicial decisions were released  
5 that bear on the issues in this proceeding. The first is *Core Communications v. FCC*, 592  
6 F.3d 139 (DC Cir. 2010)(“*Core III*”), in which the DC Circuit affirmed the rules adopted  
7 by the FCC in the *ISP Remand Order* and the 2008 *ISP Mandamus Order*. *Core III* and  
8 the briefs filed by the FCC in the *Core* appeals confirm that neither the *ISP Remand*  
9 *Order* nor the *ISP Mandamus Order* require the payment of reciprocal compensation on  
10 virtual NXX (or “VNXX”) traffic. The second decision is *Global Naps, Inc. v. Verizon*  
11 *New England Inc.*, 603 F.3d 71 (1<sup>st</sup> Cir. 2010)(“*Global Naps V*”)<sup>18</sup>, in which the First  
12 Circuit affirmed a judgment awarding Verizon New England Inc. access charges on  
13 VNXX traffic.

14                   *Core III* is the culmination of a series of FCC decisions and appeals that address  
15 whether reciprocal compensation is due on *local* calls placed to an ISP. The *ISP Remand*  
16 *Order* and the DC Circuit’s *WorldCom* remand set the stage for *Core III*. The *ISP*  
17 *Remand Order* defined the issue that the FCC addressed throughout the *Core* proceedings  
18 to be “whether reciprocal compensation obligations apply to the delivery of calls from  
19 one LEC’s end-user customer to an ISP in the same local calling area that is served by a  
20 competing LEC.”<sup>19</sup> *WorldCom* is important because the DC Circuit recognizes that the  
21 traffic referred to as “ISP-bound” in the *ISP Remand Order* involved “calls made to  
22 internet service providers (“ISPs”) located within the caller’s local calling area.”<sup>20</sup>

23                   In *WorldCom*, the DC Circuit remanded the *ISP Remand Order* to the FCC to

24 <sup>18</sup> The First Circuit describes this appeal as the fifth appeal in a series of disputes between  
25 Global Naps and Verizon. 603 F.3d at 3. Consequently, it will be referred to as “*Global*  
26 *Naps V*”.

<sup>19</sup> *ISP Remand Order*, ¶13.

<sup>20</sup> *WorldCom*, 288 F.3d at 430.

1 provide a sufficient legal rationale for the rules adopted in the *ISP Remand Order*. The  
2 FCC delayed acting on the remand and in *In re: Core Communications*, 531 F.3d 849  
3 (D.C. Cir. 2008)(“*Core III*”), the DC Circuit entered a mandamus order directing the  
4 FCC to respond to the *WorldCom* remand by November 5, 2008 with a final, appealable  
5 order that explains the legal authority for the Commission’s interim intercarrier  
6 compensation rules adopted in the *ISP Remand Order*.

7 On November 5, 2008, the FCC released the *ISP Mandamus Order*. In the *ISP*  
8 *Mandamus Order*, the FCC used the term “ISP-bound traffic” in the same way that the  
9 term was used in the *ISP Remand Order* – that is, to refer to calls placed to an ISP located  
10 in the caller’s local calling area. Indeed, the FCC provides no indication in the *ISP*  
11 *Mandamus Order* that it was expanding the scope of traffic being addressed beyond the  
12 local ISP traffic at issue in the *ISP Remand Order*. The *ISP Mandamus Order* does not  
13 even mention VNXX traffic. Moreover, it would have been unlawful for the FCC to  
14 expand the scope of traffic that it was addressing without mentioning that it was doing  
15 so.<sup>21</sup>

16 Core Communications, Inc. appealed the *ISP Mandamus Order* to the DC Circuit  
17 Court of Appeals. *Core III* is the D.C. Circuits’ decision upholding both the *ISP*  
18 *Mandamus Order* and the rules adopted in the *ISP Remand Order*. *Core III* supports  
19 Qwest’s position that under the *ISP Mandamus Order* reciprocal compensation applies  
20 only to calls placed to ISPs located in the caller’s local calling area. In *Core III*, the DC  
21 Circuit described reciprocal compensation as follows:

22 Reciprocal compensation arrangements require that when a customer of one  
23 carrier makes a *local call* to a customer of another carrier (which uses its facilities  
24 to connect, or “terminate” that call), the originating carrier must compensate the  
terminating carrier for the use of its facilities.<sup>22</sup>

25 <sup>21</sup> *Qwest Corporation v. Washington State Utilities and Transportation Commission*, 484  
F.Supp.2d 1160, 1175-76 (W.D. Wash. 2007).

26 <sup>22</sup> *Core III*, 592 F.3d at 144.

1           The parties in *Core III* all recognized that reciprocal compensation did not apply  
2 to interexchange calls. Accordingly, DC Circuit stated:

3           And, as to a LEC's provision of access for completion of a long distance call, the  
4 parties agree that the link between the LEC and the interexchange carrier is *not*  
governed by the reciprocal compensation regime of §251(b)(5).<sup>23</sup>

5           The issue before the DC Circuit in *Core III* was whether the FCC's jurisdiction  
6 over interstate calls under 47 U.S.C. §201 applied to calls to ISPs when these calls  
7 terminated locally at the ISP modem. The Petitioners argued that the FCC did not have  
8 jurisdiction over calls that terminated in the caller's local calling area. The DC Circuit  
9 summarized their argument as follows:

10           Petitioners next argue that because the call to the ISP terminates locally, the FCC's  
11 authority over interstate communications is inapplicable...Because the "called  
12 party" in the case of dial-up Internet traffic is the ISP, petitioners say, the  
§251(b)(5) telecommunications "terminat[e]" locally and thus the FCC cannot  
apply its §201 authority over these communications.

13           The petitioners could not have made this argument if the *ISP Mandamus Order*  
14 had expanded the scope of the *ISP Remand Order* to include calls placed to ISPs located  
15 outside the caller's local calling area. Their argument acknowledges that the *ISP*  
16 *Mandamus Order* has the same scope as the *ISP Remand Order* and that both decisions  
17 address only calls placed to an ISP located in the caller's local calling area.

18           In its briefs to the DC Circuit, the FCC repeatedly stated that VNXX traffic was  
19 not at issue in either the *ISP Remand Order* or the *ISP Mandamus Order*. First, in  
20 opposing Core's petition for mandamus to the DC Circuit, the FCC was emphatic that  
21 "the *ISP Remand Order* addressed only those calls to ISPs 'within the caller's local  
22 calling area'" and that "VNXX-related issues, therefore, are not within the scope of the  
23 *WorldCom* remand."<sup>24</sup> Second, in its brief to the DC Circuit on appeal of the *ISP*

24  
25 <sup>23</sup> *Id.*

26 <sup>24</sup> Opposition of Federal Communications Commission to Petition for Writ of Mandamus,  
p. 26, attached as Exhibit 1 to Qwest's June 1, 2009 Notice of Supplemental Authority.

1 *Mandamus Order*, the FCC stated again that the calls at issue were those in which “two  
2 LECs collaborate to deliver calls to an ISP within a local calling area.”<sup>25</sup> Furthermore,  
3 the FCC responded to the state petitioners’ arguments that Section 251(b)(5) of the Act  
4 should only apply to local telecommunications traffic by arguing that this argument was  
5 not ripe because nonlocal traffic was beyond the scope of the ISP-bound traffic addressed  
6 in the *ISP Mandamus Order*.<sup>26</sup>

7 The second significant decision released subsequent to the District Court’s  
8 decision is the First Circuit’s *Global Naps V* decision. *Global Naps V* is the most recent  
9 appellate court decision in lengthy litigation between Global Naps, Inc. and Verizon New  
10 England, Inc. Earlier in the litigation, in *Global Naps I*, the First Circuit upheld an  
11 interconnection arbitration decision in which the Massachusetts Department of  
12 Telecommunications and Energy (the “Massachusetts Commission”) had required Global  
13 Naps to pay Verizon access charges for all “virtual NXX” traffic, including non-local  
14 ISP-bound traffic.<sup>27</sup> Global Naps had argued that the *ISP Remand Order* required  
15 Verizon to pay reciprocal compensation for all ISP traffic and that the Massachusetts  
16 Commission was therefore preempted from requiring Global Naps to pay access charges.

17 In *Global Naps I*, the First Circuit carefully analyzed the *ISP Remand Order* and  
18 its background and context. The First Circuit observed that the “FCC has consistently  
19 maintained a distinction between local and interexchange calling and the intercarrier  
20 compensation regimes that apply to them.”<sup>28</sup> The Court noted that the FCC itself  
21 recognized in the *ISP Remand Order* that the Telecommunications Act of 1996 was not  
22

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23 <sup>25</sup> Brief for Federal Communications Commission, *Core Communications, Inc. v. FCC*,  
24 Nos. 08-1365 (D.C Cir), p. 43, attached as Exhibit 2 to Qwest’s June 1, 2009 Notice of  
Supplemental Authority.

25 <sup>26</sup> *Id.*, pp. 43-45.

26 <sup>27</sup> *Global Naps Inc. v. Verizon New England, Inc.*, 444 59 (1<sup>st</sup> Cir. 2006)

<sup>28</sup> *Id.*, at 73.

1 intended to disrupt the pre-Act interstate and intrastate access charge regimes. The Court  
2 recognized that the issue before the FCC in the *ISP Remand Order* was whether  
3 reciprocal compensation obligations apply to the delivery of calls from one LEC's  
4 customers to an ISP in the same local calling area. The Court observed that there is no  
5 statement in the *ISP Remand Order* that ISP traffic is not subject to access charges.  
6 Finally, the Court relied upon the FCC's statements in an amicus brief that in the *ISP*  
7 *Remand Order*, the FCC was considering only calls placed to ISPs located in the same  
8 local calling area as the caller. Based on its careful analysis, the First Circuit concluded  
9 that it was consistent with the *ISP Remand Order* for the Massachusetts Commission to  
10 require the payment of access charges to Verizon on VNXX traffic.

11 *Global Naps V* addresses the damages phase of the dispute between Global Naps  
12 and Verizon New England. In *Global Naps V*, the First Circuit affirmed the award of  
13 access charges to Verizon New England for the origination of VNXX ISP traffic. On  
14 appeal, Global Naps argued that the FCC's *ISP Mandamus Order* (or "2008 Order")  
15 clarified that the original *ISP Remand Order* precluded the award of access charges on  
16 VNXX traffic.<sup>29</sup> In rejecting Global Naps' arguments, the First Circuit stated that the  
17 "issues the FCC addressed in the 2008 order did not go to the regulation of intercarrier  
18 compensation for interexchange ISP traffic."<sup>30</sup> Moreover, the First Circuit reiterated its  
19 earlier holding that "the *ISP Remand Order* did not govern interexchange VNXX  
20 traffic."<sup>31</sup>

21 In *Global Naps V*, the First Circuit held that the *ISP Mandamus Order* had the  
22 same scope as the *ISP Remand Order*. The Court noted that the *ISP Mandamus Order*  
23 justified the same rate cap system as the *ISP Remand Order* and that the rate cap system  
24

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25 <sup>29</sup> *Global Naps V*, 603 F.3d at 81.

26 <sup>30</sup> *Id.*, at 82.

<sup>31</sup> *Id.*, At 79.

1 applied when two carriers collaborate to deliver calls to an ISP within a local calling area.  
2 *Id.*, at 82. The Court emphasized that the *ISP Mandamus Order*'s purpose was to justify  
3 – not change – a particular rate cap system. According to the Court, Global Naps'  
4 arguments took the *ISP Mandamus Order* out of context and ignored the purpose of the  
5 Order.

6 The First Circuit also rejected Global Naps' arguments based on the FCC's  
7 statements in the *ISP Mandamus Order* that Section 251(b)(5) is not limited to local  
8 traffic.<sup>32</sup> Global Naps' arguments were predicated on the false premise that the language  
9 of Section 251(b)(5) alone defines the reach of reciprocal compensation arrangements.  
10 That premise is false because traffic encompassed by the interstate and intrastate access  
11 charge regimes is carved out of Section 251(b)(5) by Section 251(g). The First Circuit  
12 noted that the *ISP Mandamus Order* did not address interexchange ISP traffic or even  
13 mention access charges. *Id.*, at 83. Moreover, the Court concluded that while the FCC  
14 may have had jurisdiction over interexchange ISP traffic, it did not exercise any such  
15 jurisdiction in the *ISP Mandamus Order*.

16 *Global Naps V* cannot be reconciled with the positions taken by Level 3 and Pac-  
17 West that the *ISP Mandamus Order* requires Qwest to pay reciprocal compensation on all  
18 ISP traffic including VNXX ISP traffic. By affirming the award of access charges to  
19 Verizon New England on VNXX traffic, the First Circuit recognized that the interstate  
20 and intrastate access charge regimes preserved by Section 251(g) of the Act apply to  
21 VNXX traffic. Moreover, the First Circuit rejects altogether any notion that the *ISP*  
22 *Mandamus Order* somehow expanded the scope of the *ISP Remand Order* to encompass  
23 calls placed to ISPs located outside of the caller's local calling area.

24  
25 <sup>32</sup> The *ISP Mandamus Order* refers to "ISP-bound traffic" as interstate, interexchange  
26 traffic only in a jurisdictional sense on an end-to-end basis from the caller to the websites  
the caller seeks to access,

1           **II. VNXX ISP Traffic Should Be Categorized For Compensation Purposes**  
2           **Based on the Location of the Modem To Which the Traffic is Delivered**

3           Under the FCC's rules, an ISP is treated as an end user for purposes of applying  
4 access charges. The FCC reaffirmed this rule in the *ISP Mandamus Order* when it held  
5 that calls to ISPs terminate for reciprocal compensation purposes at the ISP.<sup>33</sup> The ISP  
6 receives these calls at the modem which answers the call and routes it onto the Internet.  
7 In Level 3's case, the modem function is performed by its Media Gateway which Qwest  
8 believes is located in Phoenix. Qwest does not presently know where Pac-West located  
9 the modem(s) for the ISPs it served during the relevant time period.

10          If Level 3 and Pac-West both located the modems they used to serve ISPs in  
11 Phoenix, then calls originating in the Phoenix local calling area would qualify as "ISP-  
12 bound traffic" under the *ISP Remand Order* because the calls would have been delivered  
13 to an ISP modem in the caller's local calling area. Conversely, calls originating in other  
14 local calling areas outside of Phoenix would not qualify as ISP-bound traffic but would  
15 rather be subject to either the interstate or intrastate access charge rules, including any  
16 intrastate exemptions that might apply.

17          It is possible that application of Arizona law may lead to a bill and keep  
18 arrangement for VNXX traffic. In Washington, for example, the Washington Utilities  
19 and Transportation Commission determined that VNXX fell into an exception from  
20 intrastate access charges under which VNXX traffic was exchanged under a bill and keep  
21 arrangement so long as the CLEC paid for the transport of the VNXX traffic on Qwest's  
22

23 \_\_\_\_\_  
24 <sup>33</sup> *ISP Mandamus Order*, ¶13. By holding that ISP-bound calls terminate at the ISP, the  
25 FCC implicitly recognized that the location of the termination point matters. The  
26 location matters because it determines which of the two possible intercarrier  
compensation regimes applies – the reciprocal compensation rules or the access charge  
rules.

1 network.<sup>34</sup>

2 **III. The Appropriate Classification of VNXX ISP Traffic Cannot Be Made**  
3 **As a Matter of Law in Arizona Until Level 3 and Pac-West Disclose**  
4 **Certain Information About Their Modem Locations, Networks and the**  
5 **Traffic During the Time Period Relevant to This Dispute**

6 In this case, to determine what set of rules apply to VNXX ISP traffic in Arizona  
7 involves factual issues that requires some discovery. First, it will be necessary to  
8 determine whether Level 3 and Pac-West even terminated the traffic at issue. In other  
9 states, Level 3 witnesses have testified that Level 3 routes ISP traffic directly onto the  
10 Internet and often does not deliver the traffic to an ISP. Second, it will be necessary to  
11 determine where the modems are located to which the traffic at issue in this case was  
12 delivered and the terms under which these modems were provided to ISPs that Level 3  
13 and Pac-West serve. Third, it will be necessary at least in the case of Level 3 and  
14 possibly Pac-West to determine what portion of their total traffic originated in the  
15 Phoenix local calling area or in the local calling area in which their ISP modems are  
16 located. Finally, if the parties take different positions on how much of a refund is due to  
17 Qwest, if any, there may be a need for some discovery to ascertain the points of  
18 disagreement.

19 Qwest believes that it is possible after some discovery that the parties may be able  
20 to stipulate to enough factual issues to make a hearing unnecessary. However, it is too  
21 early to make that determination now.  
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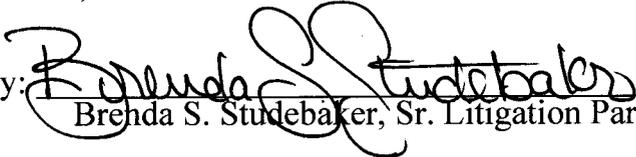
25 <sup>34</sup> Order 10, *Qwest Corporation v. Level 3 Communications, LLC*, 2008 Wash UTC  
26 LEXIS 515, ¶¶191-197 (July 16, 2008).



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