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PAC-WEST TELECOMM, INC.  
Complainant,

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

v.  
QWEST CORPORATION,  
Respondent.

LEVEL 3 COMMUNICATIONS, LLC,  
Complainant,

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

v.  
QWEST CORPORATION,  
Respondent.

**QWEST CORPORATION'S REPLY  
BRIEF REGARDING PROCEDURAL  
RECOMMENDATIONS**

**INTRODUCTION**

At the crux of this dispute is the intercarrier compensation treatment of "Virtual NXX" (or "VNXX") arrangements. Pac-West Telecomm, Inc. ("Pac-West") and Level 3 Communications, LLC ("Level 3") use VNXX arrangements in order to make long distance calls to Internet Service Providers ("ISPs") appear to be local calls.<sup>1</sup> They

<sup>1</sup> *Global Naps, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 64 (1<sup>st</sup> Cir. 2006) ("Global Naps I")

1 assign local Arizona telephone numbers to ISPs that are located outside of the caller's  
2 local calling area and outside the state of Arizona. The services Pac-West and Level 3  
3 offer through VNXX arrangements are in substance the same as toll-free 1-800 service.<sup>2</sup>  
4 By using VNXX arrangements, Pac-West and Level 3 seek to reverse the intercarrier  
5 compensation flow that applies to this traffic. They seek to obtain payments from Qwest  
6 rather than having to compensate Qwest for Qwest's origination costs. The Second  
7 Circuit Court of Appeals aptly described how CLECs use VNXX to foist their costs onto  
8 ILECs.<sup>3</sup> Affirming the Vermont Board's ruling that VNXX is not within Section  
9 251(b)(5), the court described the anti-competitive effects of VNXX:

10  
11 Global's desired use of virtual NXX simply disguises traffic subject to access  
12 charges as something else and would force Verizon to subsidize Global's services.  
13 This would likely place a burden on Verizon's customers, a result that would  
14 violate the FCC's longstanding policy of preventing regulatory arbitrage. Telecommunications regulations are complex and often appear contradictory. But the FCC has been consistent and explicit that it will not permit CLECs to game the system and take advantage of the ILECs in a purported quest to compete.<sup>4</sup>

15 As Qwest explained in its initial brief, two intercarrier compensation regimes  
16 apply to calls to ISPs. The applicability of these two regimes turns on the location of the  
17 ISP in relation to the calling party. For calls placed to ISPs located within the caller's  
18 local calling area, the *ISP Remand Order* compensation scheme applies. For calls placed  
19 to ISPs located outside of the caller's local calling area such as VNXX calls, the FCC's  
20 access charge regime applies. Under the FCC's access charge rules, an ISP is treated as

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22 <sup>2</sup> Order Ruling on Arbitration, *In re Petition of MCImetro Access for Arbitration of*  
23 *Proposed Agreement with Horry Telephone Cooperative*, 2006 S.C. PUC LEXIS 2, at  
24 \*35 (S.C. PUC, January 11, 2006)(("[V]irtual NXX calls...are no different from standard  
dialed long distance toll or 1-800 calls.").

25 <sup>3</sup> *Global Naps, Inc. v. Verizon New England, Inc.*, 454 F.3d 91 (2<sup>nd</sup> Cir. 2006)("Global  
Naps II").

26 <sup>4</sup> *Id.* at 103.

1 an end user “for the purpose of applying access charges.”<sup>5</sup> The FCC’s access charge  
2 regime in which ISPs are treated as end users is preserved by Section 251(g) of the Act  
3 until such time as the FCC explicitly supersedes the applicable regulations, orders and  
4 policies under that regime.<sup>6</sup>

5 In their supplemental briefs, Pac-West and Level 3 attempt to argue that the FCC’s  
6 *ISP Mandamus Order* (or “November 2008 Order” as Level 3 refers to it)<sup>7</sup> and the D.C.  
7 Circuit’s *Core III*<sup>8</sup> decision affirming it somehow changed the landscape in this remand  
8 proceeding. Pac-West and Level 3 are simply wrong. *The ISP Mandamus Order* and  
9 *Core III* address only calls placed to ISPs located within the caller’s local calling area.  
10 As Qwest pointed out in its initial brief, that is clear from the arguments made in *Core III*  
11 to challenge the *ISP Mandamus Order*, from the FCC’s briefs to the D.C. Circuit and  
12 from the First Circuit’s decision in *Global Naps V*. The *ISP Mandamus Order* and *Core*  
13 *III* do not address VNXX traffic.

## 14 ARGUMENT

### 15 I. Response to Pac-West

16 In its brief, Pac-West acknowledges, as it must, that under the *ISP Mandamus*  
17 *Order* and the *ISP Remand Order*, Section 251(b)(5) does not apply to  
18 telecommunications traffic that is governed by FCC rules, orders, and policies preserved  
19 by Section 251(g) of the Act. In the *ISP Mandamus Order*, the FCC stated: “we agree  
20 with the finding in the *ISP Remand Order* that traffic encompassed by section 251(g) is  
21 excluded from Section 251(b)(5) except to the extent that the Commission acts to bring  
22

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23 <sup>5</sup> *ISP Remand Order*, ¶ 11 (emphasis added).

24 <sup>6</sup> 47 U.S.C. §251(g); *Competitive Telecommunications Association v. FCC*, 117 F.3d  
1068, 1072-1073 (8<sup>th</sup> Cir. 1997).

25 <sup>7</sup> Order on Remand, *In the Matter of High-Cost Universal Service Support*, 24 FCC Rcd  
6475 (Rel. November 5, 2008)(“*ISP Mandamus Order*”).

26 <sup>8</sup> *Core Communications, Inc. v. FCC*, 592 F.3d 139 (DC Cir. 2010)(“*Core III*”).

1 that traffic within its scope.”<sup>9</sup>

2 Pac-West tries to recast the issue by asserting that “Qwest has failed to identify a  
3 single pre-Act rule or regulation that provided compensation under §251(g) for ISP-  
4 bound VNXX traffic.” (Pac-West Initial Brief, p.2). Based on this false premise, Pac-  
5 West claims that it was “entitled to compensation under the ISP Amendment at the  
6 251(b)(5) traffic rate of \$0.0007 pursuant to the parties’ contract.” (Pac-West Initial  
7 Brief, p. 2)

8 Pac-West’s argument is erroneous in the first instance because it fails to recognize  
9 the breadth of the Section 251(g) carve-out. In the *ISP Remand Order*, the FCC made  
10 clear that Section 251(g) encompasses all interexchange traffic. The FCC stated:

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

15 The pre-Act regulations, orders and policies applicable to interexchange traffic are  
16 generic and do not depend upon the specific name given to the traffic at issue – whether it  
17 be VNXX or some other name. If the traffic is interexchange traffic involving two end  
18 users in different local calling areas, it is covered by FCC Regulation 47 C.F.R. §69.5(b)  
19 which predates the Act and is preserved by Section 251(g).

20 The access charge regime has consistently applied to all interexchange traffic. In  
21 *Global Naps I*, the First Circuit concluded that in its regulations “the FCC made clear that  
22 it was leaving in place the pre-existing access charge regime that applied to  
23 interexchange calls.”<sup>11</sup> In *Verizon California, Inc. v. Peevey*,<sup>12</sup> the Ninth Circuit

24 <sup>9</sup> *ISP Mandamus Order*, ¶ 16.

25 <sup>10</sup> *ISP Remand Order*, ¶37; 47 C.F.R. §69.5(b).

26 <sup>11</sup> *Global Naps I*, 444 F.3d at 63.

<sup>12</sup> *Verizon California, Inc. v. Peevey*, 462 F.3d 1142 (9<sup>th</sup> Cir. 2006).

1 concluded as a matter of federal law that VNXX traffic is interexchange traffic. In  
2 *Peevey*, the Court held that it was permissible for the California Commission acting as an  
3 arbitrator to classify VNXX traffic as local for intercarrier compensation purposes.  
4 However, the Ninth Circuit also recognized that the California Commission did not make  
5 this determination under federal law, the Act or the FCC's reciprocal compensation rules.  
6 The Ninth Circuit affirmed the California Commission's determination that as a matter of  
7 federal law "VNXX traffic is interexchange traffic that is not subject to the FCC's  
8 reciprocal compensation rules."<sup>13</sup>

9       There are at least two other sets of regulations, orders and policies preserved by  
10 Section 251(g) of the Act that directly encompass VNXX traffic. First, as stated in the  
11 *ISP Remand Order* itself, Internet service providers ("ISPs") are treated as end users "for  
12 purposes of applying access charges"<sup>14</sup> and are treated just like any other end users. The  
13 FCC's pre-Act rules did not apply access charges based on the type of end user who was  
14 called. Rather, the Pre-Act rules established that all interexchange traffic over the public  
15 switched network is subject to access charges when the caller and the called party are in  
16 different local calling areas.<sup>15</sup>

17       Second, rules that pre-date the Act provide that for interstate FX and similar  
18 services, access charges apply at the open end.<sup>16</sup> In its brief, Pac-West attempts to argue

19 <sup>13</sup> *Id.*, at 1158.

20 <sup>14</sup> *ISP Remand Order*, ¶11; *ACS of Anchorage, Inc.*, 290 F.3d 403, 409 (DC Cir.  
21 2002("Rather than directly exempting ESPs from interstate access charges, the [FCC]  
22 defined them as "end users"—no different from a local pizzeria or barber shop.")..

23 <sup>15</sup> 47 C.F.R. § 69.5(b)(carrier's carrier charges apply to all "interexchange carriers");  
24 CLECs who offer interexchange service qualify as interexchange carriers for purposes of  
25 this rule. *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone*  
26 *IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457, ¶ 19, n. 80  
(2004)("IP-in-the-Middle Decision") ("Depending on the nature of the  
traffic,...competitive LECs may qualify as interexchange carriers for purposes of [47  
C.F.R. §69.5(b)].")

<sup>16</sup> Memorandum Opinion and Order, *In the Matter of Bell Atlantic Petition for*

1 that VNXX service and interstate FX service are different. (Pac-West Initial Br., p. 18).  
2 This is a factual issue that would require a hearing to resolve, especially since Pac-West  
3 failed to present any evidence supporting the alleged differences between VNXX service  
4 and interstate FX service. But even if these alleged differences were true, it would not  
5 matter. VNXX traffic would nevertheless be interexchange traffic subject to the normal  
6 pre-Act access charge regime that applied to all interexchange traffic.

7 Throughout its brief, Pac-West bases its entire argument that Section 251(g) does  
8 not encompass VNXX traffic on the FCC's statement in the *ISP Mandamus Order* that  
9 the D.C. Circuit had found in *WorldCom* that "there had been no pre-Act obligation  
10 relating to intercarrier compensation for ISP-bound traffic."<sup>17</sup> However, the traffic the  
11 *WorldCom* court was addressing included only calls placed to an ISP located within the  
12 caller's local calling area.<sup>18</sup> The *WorldCom* Court's statement that there were no pre-Act  
13 rules applicable to calls made to ISPs located within the caller's local calling area was  
14 only true because there were no pre-Act intercarrier compensation rules applicable to any  
15 local calls involving two end users communicating within the same local calling area.  
16 VNXX calls, which by definition are made to ISPs located outside the caller's local  
17 calling area, were completely outside the scope of *WorldCom*, as the FCC itself has  
18 acknowledged.<sup>19</sup>

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21 *Declaratory Ruling concerning Application of the Commission's Access Charge Rules to*  
22 *Private Telecommunications Systems*, 2 FCC Rcd 7458, ¶¶5, 12 (1987)(FCC's access  
charge rules subject open end of FX lines "and their equivalents" to access charges).

23 <sup>17</sup> *ISP Mandamus Order*, ¶16.

24 <sup>18</sup> *WorldCom v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002).

25 <sup>19</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;  
Brief for Federal Communications Commission, *Core Communications, Inc. v. FCC*, No.  
08-1365 (D.C. Cir.), attached as Exhibit 2 to Qwest's June 1, 2009 Notice of  
26 Supplemental Authority.

1 Pac-West's reliance on *Pacific Bell v. Pac-West Telecomm, Inc.*<sup>20</sup> is similarly  
2 misplaced. (Pac-West Initial Br., p.16) The traffic at issue in the California Commission  
3 orders under review in *Pacific Bell* consisted of calls where "the customer who originates  
4 the call and the ISP modem that receives the call are both within the same local calling  
5 area."<sup>21</sup> *Pacific Bell* did not involve VNXX traffic and, consequently, does not support  
6 Pac-West's position. Pac-West states that in *Pacific Bell*, the Ninth Circuit recognized  
7 that as a direct result of *WorldCom*, "the compensation obligation arising under section  
8 251(g) cannot apply to ISP-bound traffic." (Initial Brief, p. 16). However, because it  
9 relies upon *WorldCom*, *Pacific Bell* is confined to the fact pattern under review in  
10 *WorldCom* – namely calls placed to an ISP located in the caller's local calling area.

11 Pac-West also relies upon *WorldCom* to argue that Section 251(g) does not apply  
12 because LEC services to other LECs are not to either an IXC or an ISP. Pac-West is  
13 wrong on this point as well. Pac-West is an interexchange carrier when it engages in  
14 VNXX service, which, by definition, entails the interexchange carriage of telephone  
15 calls. Pac-West does not dispute that interexchange carriers existed prior to the Act.  
16 Indeed, the FCC has expressly recognized that depending upon the traffic, carriers  
17 otherwise known as CLECs may qualify as interexchange carriers under the FCC's  
18 rules.<sup>22</sup>

19 With VNXX, Pac-West creates a toll-free interexchange service that allows dial-  
20 up customers to place calls to ISPs in a different local calling area. Qwest provides  
21 originating access to Pac-West, the IXC, in this circumstance. Again, Pac-West's  
22 reliance upon *WorldCom* is misplaced because *WorldCom* was addressing only calls  
23 placed to an ISP located within the caller's local calling area, a situation that involves a  
24

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25 <sup>20</sup> *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114 (9<sup>th</sup> Cir. 2003)(“*Pacific Bell*”).

26 <sup>21</sup> *Id.*, at 1120-1121.

<sup>22</sup> *IP-in-the-Middle decision*, 19 FCC Rcd 7457, ¶19, fn. 80.

1 service provided by a LEC to another LEC. Interexchange calls involving a caller in one  
2 local calling area and an ISP in a different local calling area were not at issue in  
3 *WorldCom*.

4 In Section II of its brief, Pac-West asserts that the appropriate classification of  
5 VNXX calls can be made solely as a question of law. To reach this conclusion, Pac-West  
6 assumes incorrectly that the parties are in agreement on three facts. First, Pac-West  
7 erroneously asserts that the parties agree that the traffic at issue in this case ISP-bound  
8 traffic. In fact, the parties disagree completely on this point. The term "ISP-bound" has  
9 been used in all of the FCC orders at issue in this dispute to mean calls placed to an ISP  
10 located in the caller's local calling area. Pac-West stipulates in its second assumed fact  
11 that the calls at issue originate and terminate in different local calling areas. Accordingly,  
12 the calls are interexchange calls subject to the FCC's access charge rules that do not  
13 qualify as "ISP-bound" calls as that term is used in the *ISP Remand Order* and *ISP*  
14 *Mandamus Order*. Furthermore, Pac-West has never presented any evidence that the  
15 calls at issue were delivered (or terminated) to ISPs. Third, Pac-West believes that the  
16 term "locally dialed" is a fact issue that somehow affects the outcome of this case.  
17 However, the term "locally dialed" has no legal or regulatory significance. It is an  
18 invention by Pac-West and Level 3 that they erroneously use to try to redefine  
19 interexchange calls as local calls.

20 In Section 2(a) of its Brief, Pac-West argues that the *ISP Mandamus Order* and the  
21 DC Circuit decision in *Core III* control this dispute. The authorities Pac-West relies upon  
22 involve the appeal of Commission decisions approving interconnection agreements, a fact  
23 pattern that does not exist in this case. The agreements at issue here were approved by  
24 the Commission and never challenged on appeal. Both the Level 3 and Pac-West ISP  
25 Amendments terminated before the *ISP Mandamus Order* was issued and *Core III* was  
26 decided.

1           In its brief, Pac-West contends that the FCC did not change its interpretation of the  
2 Telecommunications Act of 1996 in the *ISP Mandamus Order*. (Pac-West Initial Brief,  
3 p. 5). The *ISP Remand Order* and the *ISP Mandamus Order* both hold that traffic  
4 encompassed by regulations, orders and policies preserved by Section 251(g) is excluded  
5 from Section 251(b)(5). Thus, in this case, whether the *ISP Mandamus Order* is  
6 controlling is largely beside the point. VNXX traffic is interexchange traffic that was  
7 encompassed by pre-Act rules preserved by Section 251(g). As such it is not subject to  
8 reciprocal compensation under Section 251(b)(5).

9           Throughout its brief, Pac-West erroneously combines the FCC's discussion in the  
10 *ISP Mandamus Order* concerning the scope of Section 251(b)(5) standing alone with the  
11 term ISP-bound as it is used in the FCC's orders. The FCC never stated in the *ISP*  
12 *Mandamus Order* or elsewhere that the term "ISP-bound" is not limited geographically.  
13 The term ISP-bound has always been used in the FCC's orders to refer to calls placed to  
14 an ISP located within the caller's local calling area.

15           The FCC's statements about the scope of Section 251(b)(5) are a separate matter.  
16 When the FCC states that Section 251(b)(5) is not limited geographically, it makes that  
17 statement about Section 251(b)(5) standing alone and without regard to Section 251(g) of  
18 the Act. Qwest's argument in this case is not that Section 251(b)(5) by itself is limited to  
19 local calls. Qwest's argument is that the temporary carve-out in Section 251(g)  
20 encompasses all interexchange traffic where the two end users are in different local  
21 calling areas. That is what the FCC held in the *ISP Remand Order*.

22           In its brief, Pac-West suggests that because the location of the ISP is of "no  
23 significance" for purposes of the FCC's jurisdictional analysis upheld in *Core III*, the  
24 location of the ISP is also irrelevant for purposes of Section 251(b)(5) of the Act. (Pac-  
25 West Br., p. 6). On this point, Pac-West erroneously confuses the FCC's jurisdictional  
26 analysis in the *ISP Mandamus Order* with the FCC's analysis of Section 251(b)(5). For

1 jurisdictional purposes, the FCC treated a call to an ISP on an end-to-end basis from the  
2 caller to websites on the Internet and concluded that it was interstate traffic such that the  
3 FCC had authority to regulate rates for ISP-bound traffic under Section 201 of the Act.  
4 However, the FCC did not analyze ISP traffic on an end-to-end basis to determine  
5 whether it came within Section 251(b)(5) of the Act. Rather, the FCC concluded that  
6 Section 251(b)(5) did not apply to traffic governed by rules preserved by Section  
7 251(g).<sup>23</sup>

8 To make VNXX traffic compensable under its ISP Amendment with Qwest, Pac-  
9 West asserts that VNXX traffic qualifies both as “ISP-bound traffic” and as Section  
10 251(b)(5) traffic. (Pac-West Br., p. 11). The District Court has already rejected Pac-  
11 West’s argument that VNXX traffic constitutes ISP-bound traffic as that term was used in  
12 the *ISP Remand Order*. In *Global Naps V*<sup>24</sup>, the First Circuit rejected Pac-West’s  
13 argument concerning the use of that term in the *ISP Mandamus Order*. As discussed  
14 above, VNXX traffic does not constitute Section 251(b)(5) traffic because it falls within  
15 the Section 251(g) carve-out to Section 251(b)(5).

16 Finally, Pac-West argues incorrectly that industry practice and course of dealing  
17 somehow make all ISP traffic compensable under the Pac-West ISP Amendment. Pac-  
18 West presented no evidence to support this argument in its initial brief.<sup>25</sup> Moreover,  
19 Qwest refuted this argument with evidence in its April 9, 2009 response to Pac-West’s  
20 initial motion for summary determination. Specifically, Qwest demonstrated that Qwest  
21 never knowingly paid Pac-West for VNXX traffic.<sup>26</sup> When Qwest developed evidence

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22 <sup>23</sup> *ISP Mandamus Order*, ¶ 9.

23 <sup>24</sup> *Global Naps v. Verizon New England*, 603 F.3d 71 (1<sup>st</sup> Cir. 2010)

24 <sup>25</sup> Pac-West alleges that accounting records support its position but did not produce any  
25 such records in either this brief or its 2009 motion for summary determination. (Pac-  
25 West Br., p. 20).

26 <sup>26</sup> Affidavit of Larry Brotherson, ¶¶5-8, attached as Exhibit A to Qwest Corporation’s  
26 Response to the Motion for Summary Determination of Pac-West Telecomm, Inc.

1 that Pac-West was engaging in VNXX, Qwest disputed that it was obligated to pay  
2 intercarrier compensation on such traffic and withheld payment.<sup>27</sup>

3 **II. Response to Level 3**

4 **A. VNXX ISP Traffic is Not Subject to Section 251(b)(5)**

5 In its argument, Level 3 refers to the *ISP Mandamus Order* as the *November 2008*  
6 *Order*. According to Level 3, because the FCC held that Section 251(b)(5) standing  
7 alone is not limited geographically, “Section 251(b)(5) applies to VNXX ISP-bound  
8 traffic along with all other ISP-bound traffic.” (Level 3 Br. pp 1-2). Level 3 argues  
9 further that because the *ISP Mandamus Order* supplies the legal rationale required by the  
10 DC Circuit’s May, 2002 *WorldCom* decision, the *ISP Mandamus Order* must therefore  
11 relate back to cover the entire period at issue in this case. (Level 3 Br. P. 2). Neither of  
12 these arguments is correct.

13 Level 3’s argument that the *ISP Mandamus Order* relates back to at least May,  
14 2002 is wrong because the cases Level 3 relies upon don’t apply here. The Ninth Circuit  
15 decisions Level 3 relies upon involve judicial review of a Commission’s decision to  
16 approve an interconnection agreement. This case involves a dispute under a previously  
17 approved interconnection agreement. The Level 3 ISP Amendment was approved long  
18 ago and that decision was never appealed. Accordingly, the law in effect while the  
19 agreement was in effect governs here. The entire time period during which the Level 3  
20 ISP Amendment was in effect predates the *ISP Mandamus Order*. However, whether the  
21 *ISP Mandamus Order* controls this dispute is largely an academic issue. The *ISP*  
22 *Mandamus Order* reaffirms the holding in the *ISP Remand Order* that Section 251(b)(5)  
23 does not apply to traffic encompassed by the interstate and intrastate access charge  
24 regimes.

25 Level 3’s argument that the *ISP Mandamus Order* makes Section 251(b)(5)

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26 <sup>27</sup> *Id.*,

1 applicable to VNXX traffic is wrong because it confuses (1) how the *ISP Mandamus*  
2 *Order* uses the term “ISP-bound” with (2) the FCC’s standalone analysis of Section  
3 251(b)(5) of the Act. The *ISP Mandamus Order* is an order on remand as it clearly states  
4 before paragraph 1 of the *Order*. Accordingly, it addresses only the traffic at issue in the  
5 *WorldCom* remand. In *WorldCom*, the DC Circuit expressly stated that the traffic at issue  
6 consisted of “calls made to internet service providers (“ISPs”) located within the caller’s  
7 local calling area.”<sup>28</sup> The *ISP Mandamus Order* does not anywhere mention VNXX  
8 traffic or state that it is addressing traffic other than the ISP-bound traffic that was the  
9 subject of the *WorldCom* remand. Moreover, in its briefs to the DC Circuit both before  
10 and after the *ISP Mandamus Order* was issued, the FCC plainly stated that VNXX traffic  
11 was not part of the remand and that the only traffic at issue consisted of local ISP traffic.

12 To make its argument, Level 3 misuses the FCC’s standalone analysis of Section  
13 251(b)(5) of the Act to reach the erroneous conclusion that the *ISP Mandamus Order*  
14 somehow addresses VNXX traffic. However, Section 251(b)(5) is not a standalone  
15 provision. The *ISP Mandamus Order* holds that Section 251(g) is a temporary carve-out  
16 to Section 251(b)(5) that remains in effect until the FCC “explicitly supersedes” the pre-  
17 Act regulations, orders and policies of the FCC. The effect of the Section 251(g) carve-  
18 out is to take all interexchange traffic involving end users in different local calling areas  
19 out of Section 251(b)(5) until the FCC brings such traffic within Section 251(b)(5).

20 Level 3 argues incorrectly in its brief that *WorldCom* “plainly ruled that the entire  
21 ‘Section 251(g)’ theory was wrong” and implies that Section 251(g) has no legal effect.  
22 (Level 3 Br. 6). In fact, *WorldCom* recognizes that Section 251(g) “embraces pre-  
23 existing obligations under a regulation, order, or policy” of the FCC.<sup>29</sup> The *WorldCom*  
24 court disagreed with the FCC’s analysis in the *ISP Remand Order* in only two respects.

25 \_\_\_\_\_  
26 <sup>28</sup> *WorldCom v. FCC*, 288 F.3d 429, 430 (DC Cir. 2002).

<sup>29</sup> *WorldCom*, 288 F.3d at 433.

1 First, the Court stated that there were no pre-Act rules applicable to the type of traffic at  
2 issue in the *ISP Remand Order* – that is, calls to an ISP within the caller’s local calling  
3 area. Second, since calls to an ISP in the caller’s local calling area involved service by  
4 one LEC to another, it did not involve service by a LEC to an interexchange carrier or  
5 information service provider. *WorldCom* did not in any way address VNXX traffic.

6 In the *ISP Mandamus Order*, the FCC reaffirms the continued force of Section  
7 251(g). The FCC states:

8 Notwithstanding section 251(b)(5)’s broad scope, we agree with the finding in the  
9 *ISP Remand Order* that traffic encompassed by section 251(g) is excluded from  
10 section 251(b)(5) except to the extent that the Commission acts to bring that traffic  
11 within its scope. Section 251(g) preserved the pre-1996 Act regulatory regime  
12 that applies to access traffic, including rules governing “receipt of  
13 compensation.”<sup>30</sup>

14 In the *ISP Remand Order*, the FCC held that Section 251(g) excluded all “access traffic”  
15 from the purview of section 251(b)(5), including intrastate access traffic.<sup>31</sup> Level 3  
16 erroneously claims that Section 251(g) is a narrow exception to Section 251(b)(5). In  
17 fact, as the FCC itself has stated, Section 251(g) broadly encompasses all access traffic.  
18 Neither the FCC nor the courts have described Section 251(g) as a narrow exception.  
19 Furthermore, the carve-out for interstate and intrastate access traffic remains the law  
20 today because the DC Circuit left the *ISP Remand Order* in effect in *WorldCom* and  
21 affirmed the *ISP Mandamus Order* in *Core III*.

22 Level 3 incorrectly asserts that Section 251(g) does not apply in this case for three  
23 reasons. First, Level 3 asserts that LEC-to-LEC intercarrier compensation obligations did  
24 not exist before the Act and are not preserved by Section 251(g). This argument is  
25 irrelevant. The VNXX traffic at issue here is interexchange traffic involving a service  
26 provided by Qwest, a LEC, to Level 3 and Pac-West. Level 3 and Pac-West are

<sup>30</sup> *ISP Mandamus Order*, ¶16.

<sup>31</sup> *ISP Remand Order*, ¶37, n. 66.

1 interexchange carriers for this traffic and are subject to the pre-Act access charge rules  
2 applicable to all interexchange traffic involving end users in different local calling areas.

3         Second, Level 3 asserts without any support that intercarrier compensation  
4 obligations for ISP-bound traffic did not exist prior to the 1996 Act. (Level 3 Br., p. 8).  
5 In fact, ISPs are a subcategory of Enhanced Service Providers (“ESPs) and ESPs very  
6 clearly did exist prior to the Act.<sup>32</sup> Moreover, in the *ISP Remand Order*, the FCC  
7 expressly recognized that there were intercarrier compensation obligations for ISP-bound  
8 traffic prior to the 1996 Act. The FCC stated based on the pre-Act rules that “ESPs,  
9 including ISPs, are treated as end users for the purposes of applying access charges.”  
10 (See Qwest Initial Brief, p. 5).

11         Third, Level 3 argues that VNXX traffic did not exist prior to the 1996 Act. This  
12 argument erroneously presupposes that the name given to a type of interexchange traffic  
13 somehow controls. However, Section 251(g) does not list particular services by name.  
14 Rather, section 251(g) preserves the access charge regime, including receipt of  
15 compensation under all FCC orders, regulations and policies in place at the time of the  
16 Act. There is nothing in the language of Section 251(g) that refers to specific enumerated  
17 services. Under the pre-Act rules, access charges applied to all interexchange calls. A  
18 carrier cannot avoid the access charge regime preserved by Section 251(g) simply by  
19 giving an interexchange service a new name like “VNXX.”

20         To be sure, VNXX traffic falls squarely within Section 251(g). It does not involve  
21 a service provided by a LEC to another LEC. VNXX traffic is interexchange traffic and  
22 therefore necessarily involves a service provided by one or more LECs to an  
23 interexchange carrier. Level 3 and Pac-West are the carriers that engage in VNXX and  
24 therefore qualify as interexchange carriers under the FCC’s rules. That there is no third-  
25 party interexchange carrier involved with VNXX does not in any way change the nature

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26 <sup>32</sup> *ISP Remand Order*, ¶11.

1 of the traffic or the applicability of Section 251(g). The FCC has itself recognized that  
2 CLECs can qualify as interexchange carriers under the FCC's rules.<sup>33</sup>

3 *Global Naps V*<sup>34</sup> confirms the correctness of Qwest's position by affirming an  
4 award of access charges on VNXX traffic. Level 3 erroneously claims that *Global Naps*  
5 *V* is wrongly decided. First, Level 3 argues that preemption is not the issue and that the  
6 *Global Naps V* court's reliance upon a preemption analysis is therefore in error. Level 3  
7 is simply wrong. The question is whether the *ISP Mandamus Order* holds that Section  
8 251(b)(5) rather than the access charge regime applies to VNXX traffic. *Global Naps V*  
9 upholds the application of the access charge regime to VNXX traffic, not reciprocal  
10 compensation. As the Court correctly observes, the *ISP Mandamus Order* is a decision  
11 on remand that addresses only the traffic that was addressed in the *ISP Remand Order* –  
12 that is, calls to an ISP in the caller's local calling area.<sup>35</sup>

13 Second, Level 3 asserts that the Court apparently misunderstood that the FCC did  
14 a complete rethinking of the scope of Section 251(b)(5) in the *ISP Mandamus Order*.  
15 However, that is simply not the case. As discussed above, the *ISP Mandamus Order*  
16 reaffirms that Section 251(g) is a carve-out, albeit a temporary one, from the scope of  
17 Section 251(b)(5). On this point, the FCC did not rethink the scope of Section 251(b)(5).  
18 The FCC reaffirmed the holding in the *ISP Remand Order*. The entire *ISP Mandamus*  
19 *Order* was upheld in *Core III*.

20 In paragraph 6 of the *ISP Mandamus Order*, the FCC refers to ISP-bound traffic as  
21 interstate interexchange traffic. In *Global Naps V*, the First Circuit analyzed this  
22 statement and concluded that it was a statement about the FCC's jurisdiction over ISP-  
23 bound traffic, not a statement concerning the applicability of the *ISP Remand Order's*  
24

25 <sup>33</sup> *IP-in-the-Middle Decision*, ¶19, n 80..

26 <sup>34</sup> *Global Naps, Inc. v. Verizon New England, Inc.*, 603 F.3d 71 (1<sup>st</sup> Cir. 2010)

<sup>35</sup> *Id.*, at 81-82.

1 reciprocal compensation scheme. The First Circuit concluded that the fact that the FCC  
2 would have jurisdiction over VNXX ISP traffic does not mean that the FCC exercised  
3 such jurisdiction in the *ISP Mandamus Order*. Ultimately, the Court correctly concluded  
4 that the FCC had not exercised jurisdiction over VNXX ISP traffic in the *ISP Mandamus*  
5 *Order*.

6 Level 3's reliance upon the *Brand X*<sup>36</sup> decision is completely misplaced. *Brand X*  
7 involved a direct conflict between a decision by the FCC and a decision by a court of  
8 appeals with respect to the interpretation of an ambiguous statute. Such a conflict is not  
9 at all present in *Global Naps V*. The issue in *Global Naps V* and here is whether the FCC  
10 ruled in the *ISP Mandamus Order* that VNXX traffic is subject to Section 251(b)(5)  
11 reciprocal compensation. *Global Naps V* answered that question correctly. The *ISP*  
12 *Mandamus Order* does not address VNXX traffic. It addresses only the traffic that was at  
13 issue in the remand--calls to an ISP in the caller's local calling area. Moreover, the FCC  
14 itself stated in its briefs to the DC Circuit that VNXX traffic was not at issue in the  
15 *WorldCom* remand.

16 **B. VNXX Traffic is Not EAS/Local Traffic Under the Parties' ICA**

17 To begin its argument for compensation under the Parties' ICA, Level 3 presents a  
18 lengthy argument, largely unsupported by legal authority, as to the Commission's  
19 jurisdiction to resolve this case. Level 3 concedes that the Commission has the authority  
20 to arbitrate, approve and enforce ICAs under Sections 251 and 252 of the Act even with  
21 respect to issues concerning interstate traffic. (Level 3 Br., p. 13). Level 3 brought this  
22 case in the first instance alleging that the Commission had such authority and the  
23 Commission initially granted Level 3's request for relief. At this juncture, the question is  
24 whether Level 3 must refund payments made by Qwest pursuant to the Commission's  
25

26 <sup>36</sup> *National Cable Television Association v. Brand X Internet Services*, 545 U.S. 967 (2005).

1 initial order. This is a question of whether Qwest is entitled to enforcement of the  
2 interconnection agreement according to its terms and falls both within (1) the  
3 Commission's overall power to undo its own orders found on review and reconsideration  
4 to have been unlawful and (2) its power to enforce the Parties' interconnection  
5 agreement. Qwest is not asking the Commission to do anything beyond its authority and  
6 is not asking the Commission to establish a compensation scheme for this traffic outside  
7 the purview of the ICA.

8 In an effort to retain the monies Qwest paid pursuant to the Commission's initial  
9 order, Level 3 argues that VNXX traffic should be considered "EAS/local" traffic under  
10 the Parties' ISP Amendment and claims that there is no dispute in this case as to how  
11 VNXX works. In fact, VNXX traffic is not EAS/local traffic under Arizona's rules and  
12 there is a dispute as to precisely how Level 3 and Pac-West engage in VNXX. Level 3  
13 concedes in its argument that with VNXX, the ISP to which the call is delivered, if any, is  
14 not located in the caller's local calling area. That fact ends the debate in Arizona as to  
15 the classification of VNXX calls. Because they do not originate and terminate in the  
16 same local calling area, VNXX calls are interexchange calls, not local calls under  
17 Arizona's rules. Under federal law, state commissions have authority to define local  
18 calling areas in their respective states for both interstate and intrastate traffic.<sup>37</sup> Local  
19 calling areas are geographic in Arizona and the Commission has never used telephone  
20 numbers to define local calling areas.<sup>38</sup>

21 <sup>37</sup> First Report and Order, *In the matter of the Implementation of the Local Competition*  
22 *Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶1035 (Rel. Aug. 8,  
1996).

23 <sup>38</sup> See Decision No. 68817, *In the Matter of the Petition of Level 3 Communications LLC*  
24 *for Arbitration of an Interconnection Agreement with Qwest Pursuant to Section 252(b)*  
25 *of the Telecommunications Act of 1996*, Docket Nos. T-03654A-05-0350 and T-01051B-  
26 05-0350, pp. 21-30 (ACC June 29, 2006)(Banning VNXX arrangements in Arizona as  
inconsistent with the Commission's system of classifying calls based on geographic local  
calling areas).

1           Moreover, Level 3's argument that VNXX calls should be treated as local calls  
2 involves fact issues for which Level 3 has presented no evidence. For example, Level 3  
3 argues without support that "the end user is billed for these calls as local calls." In fact,  
4 by engaging in VNXX, Level 3 prevents Qwest's billing systems from billing originating  
5 access on these calls. Thus, to say that VNXX calls are billed as local calls is completely  
6 misleading. Furthermore, there has been no discovery yet on how Level 3 bills for its  
7 VNXX service. Thus, how VNXX calls are billed is a completely open fact issue.

8           Level 3 also argues that the ILEC "delivers the calls to the CLEC at a LATA-wide  
9 point of interconnection, in exactly the same manner as applies to purely, geographically  
10 local ILEC-to-CLEC calls." However, in the next sentence, Level 3 concedes that  
11 VNXX calls do not terminate within the same local calling area from which they  
12 originate. Level 3 observes that "once the CLEC gets the call, it does not (as it would  
13 with a pure "local" call) bring the call back to the originating local calling area; instead, it  
14 delivers the call to its customer in a distant location." (Level 3 Br., p. 15). Thus, not  
15 only is the call not purely local, it is not local at all. What Level 3 has described is a pure  
16 interexchange call.

17           Level 3's reliance upon the DC Circuit's *Bell Atlantic*<sup>39</sup> decision is completely  
18 misplaced. In *Bell Atlantic*, the DC Circuit addressed "whether calls to internet service  
19 providers ("ISPs") within the caller's local calling area are themselves 'local.'" The fact  
20 that the ISP was located in the caller's local calling area led to a debate as to whether the  
21 calls fit within the local or the long distance model. The Court observed that these calls  
22 are not quite local "because there is some communication taking place between the ISP  
23 and out-of-state websites. But they are not quite long distance, because the subsequent  
24 communication is not really a continuation, in the conventional sense, of the initial call to  
25

26 <sup>39</sup> *Bell Atlantic v. FCC*, 206 F.3d 1 (DC Cir. 2000).

1 the ISP.”<sup>40</sup> In *Bell Atlantic*, CLECs argued that ISP-bound calls were local calls under  
2 the FCC’s rules because the calls allegedly terminated at the ISP located in the caller’s  
3 local calling area. At that time, the FCC’s rules provided that reciprocal compensation  
4 was due only on calls that originated and terminated in the same local calling area.

5 VNXX traffic is not local at all under the *Bell Atlantic* analysis. With VNXX  
6 traffic, the ISP is located outside of the caller’s local calling area. Thus, it does not  
7 matter that the call may continue on to out-of-state websites. A VNXX call is an  
8 interexchange call under the *Bell Atlantic* analysis regardless of whether the termination  
9 point of the call is viewed as the ISP or the out-of-state websites the caller seeks to  
10 access. In short, *Bell Atlantic* completely undermines Level 3’s argument.

11 Level 3’s final argument for treating VNXX calls as local calls is its claim that  
12 these calls are not dialed on a 1+ basis and that there are no toll charges associated with  
13 them.<sup>41</sup> Neither of these points is relevant under the FCC’s rules. Under the FCC’s rules,  
14 access charges apply to all interexchange calls regardless of how they are dialed and  
15 regardless of whether there is a separate charge for the calls.<sup>42</sup> Furthermore, how Level 3  
16 charges for its service to ISPs, and for VNXX service in particular, remains a completely  
17 open fact question for which Level 3 has presented no evidence.

18  
19  
20  

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<sup>40</sup> *Id.*, at 5.

21 <sup>41</sup> Level 3 also asserts in a footnote that VNXX is like extended area service (“EAS”).  
22 However, EAS is established by the Commission in Arizona, not unilaterally by a single  
23 carrier, and is geographically defined. Moreover, the Commission has banned VNXX in  
24 Arizona. Thus, VNXX is not like EAS at all.

24 <sup>42</sup> 47 CFR 69.5(b); *Global Naps v. Verizon New England Inc.*, 454 F.3d 91, 98  
25 (2006)(What really matters in determining whether an access charge is appropriate is  
26 “whether a call traversed local exchanges, not how a carrier chose to bill its customers.  
Thus, Global’s argument that since it imposes no separate fee, its traffic cannot be  
considered toll traffic, is besides the point.”)



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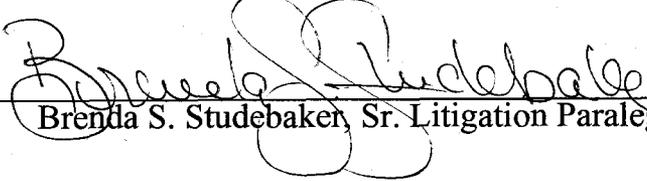
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