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**BEFORE THE ARIZONA CORPORATION COMMISSION**

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ARIZONA CORPORATION COMMISSION  
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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

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**LEVEL 3 COMMUNICATIONS, LLC**

**RESPONSIVE BRIEF**

**November 12, 2010**

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**I. INTRODUCTION AND SUMMARY**

Level 3 Communications, LLC (“Level 3”) submits this Responsive Brief, pursuant to the Procedural Order dated August 24, 2010 of the Arizona Corporation Commission (“ACC” or “Commission”) in the above-captioned consolidated proceedings.

At the outset, and as with the original proceedings in this matter, none of the pleadings reveals any disputed issues of material fact. No facts were in dispute when the Commission first heard this matter in 2005 and 2006, and no facts are in dispute now. Then, as now, everyone knew that the traffic at issue – ISP-bound VNXX traffic – is dialed on a “local” basis. There were no questions as to whether any other form of traffic was at issue. There was no “1+” traffic (routed to a third-party long distance carrier) at issue then, and there is no such traffic now. Then, as now, all the traffic at issue went directly from one LEC (Qwest) to another (Level 3). There was not, and is not, any dispute that the traffic is routed between Level 3 and Qwest just like any purely “local” traffic would flow. And, there is no question as to whether these calls are treated as local for purposes of billing the customers making the calls – they were, and they are. And, finally, there is no dispute that the ISPs being called are located in a different calling area than are the customers placing calls to them.

No facts have changed from when the Commission earlier decided these matters on summary judgment. Qwest has not adduced any actual evidence of any change in traffic type or dialing pattern that is relevant to this dispute. The question now, as it was originally, is whether or not the relevant legal and regulatory precedents require Qwest to pay Level 3 \$0.0007 per minute for dial-up traffic originating on Qwest’s network and terminating to Level 3’s network. Then, as now, however, Qwest attempts to use an ancient term associated with flat-rated traffic – “local” – as a talisman that would trump federal law, sweep aside state jurisdiction, and again,

allow Qwest the continuing luxury of avoiding its obligations as an incumbent LEC to properly compensate interconnecting co-carriers for the termination of traffic at a federally mandated rate.

Only the legal question remains: whether the Arizona Corporation Commission correctly required Qwest to pay reciprocal compensation for dialup calls originated on Qwest's network and handed off to Level 3 for delivery to ISPs. An evidentiary hearing would not only be a waste of time and resources, but also would necessarily contort controlling federal precedent that says all ISP-bound traffic, whether geographically local or not, is subject to Section 251(b)(5) and the FCC's single compensation regime for ISP-bound traffic.

On the legal merits, Qwest's case depends on an expansive and unrestrained view of Section 251(g). All parties agree that ISP-bound calls are jurisdictionally interstate. All parties agree that reciprocal compensation applies to all traffic not covered by Section 251(g). The D.C. Circuit, in *WorldCom*,<sup>1</sup> explained that Section 251(g) is nothing more than a transitional mechanism that preserves the application of access charges to traffic routed directly between a LEC and an IXC, of a type that existed when the 1996 Act was passed. It does not apply to LEC-to-LEC compensation at all, and does not apply to compensation for traffic types (such as ISP-bound traffic) for which no set compensation rule existed as of that time. It therefore does not, and cannot, apply to VNXX ISP-bound traffic routed between two LECs – Qwest and Level 3.

Qwest tries to avoid application of the November 2008 *ISP Mandamus Order*, in which the FCC explained the broad scope of Section 251(b)(5) and accepted the limited scope of Section 251(g).<sup>2</sup> However, as we explained in our opening brief, in the Ninth Circuit the law

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<sup>1</sup> *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

<sup>2</sup> *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Lifeline* (note continued)...

applied when making a decision under the 1996 Act is the law as it exists at the time of the decision.<sup>3</sup> That rule is particularly appropriate here because the *ISP Mandamus Order* provided the first legally valid justification for treating ISP-bound traffic differently from all other traffic for purposes of reciprocal compensation – a justification that the D.C. Circuit had demanded in May 2002. The rationale in the *ISP Mandamus Order* relates back at least to that time – and, therefore, covers the entire period in dispute.

Finally, Qwest argues that because (in its view) VNXX ISP-bound traffic is not covered by Section 251(b)(5), the Commission should simply treat the ISP as an end user and impose either reciprocal compensation, intrastate access charges or interstate access charges – depending on where the ISP is physically located. But this argument simply ignores the uncontested jurisdictionally interstate nature of ISP-bound traffic. Moreover, Qwest’s approach would create a bizarre scheme under which federal and state rates would apply in an illogical manner. Under Qwest’s view, federally-established rates would govern compensation for ISP-bound traffic that (based on the ISP’s location) would be physically local (reciprocal compensation) or physically interstate (interstate access), but would apply intrastate rates (intrastate access) to traffic where the ISP is in-state but not “local” to the caller. The fact that Qwest can advance this scheme in the face of an FCC ruling that flat-out said that the reach of reciprocal compensation is *not*

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... (note continued)

*and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act 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) (“*ISP Mandamus Order*”), affirmed, *Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010). This order was referred to as the “November 2008 Order” in Level 3’s Initial Brief.

<sup>3</sup> *US WEST v. Jennings*, 304 F.3d 950 (9th Cir. 2002).

limited by geography<sup>4</sup> is a testament to Qwest's willingness to ignore the law in its quest to avoid paying Level 3 for the millions of minutes of usage that Qwest's end users impose on Level 3's network when they make calls to dial-up ISPs.

The Commission should reject this bizarre scheme and, instead, accept the *ISP Mandamus Order* for what it is – the FCC's statement of the compensation that applies to any locally-dialed ISP-bound traffic.<sup>5</sup>

## II. THE FCC'S *ISP MANDAMUS RULING* GOVERNS THIS CASE.

### A. According to the *ISP Mandamus Order*, Section 251(b)(5) Applies to VNXX ISP-Bound Calls, and Such Calls are Not Subject to Section 251(g).

Qwest misunderstands the *ISP Mandamus Order* and, therefore, the application of Section 251(g). Section 251(g) preserves the ability of ILECs to impose access charges on traditional long distance carriers when the ILECs' customers make or receive traditional "1+" long distance calls. It does not apply to LEC-to-LEC compensation at all, and does not apply to ISP-bound traffic at all. Section 251(g), therefore, has no application to this case.

#### 1. The Legal and Procedural Context of the *ISP Mandamus Order*.

We summarized the development of the FCC's understanding of compensation for ISP-bound traffic in our opening brief. To quickly recap where things stood when the FCC issued the *ISP Mandamus Order*: in 2001, the FCC had ruled in the *ISP Remand Order* that Section 251(g) applied to "carve out" LEC-to-LEC ISP-bound traffic from the scope of Section 251(b)(5) on the

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<sup>4</sup> *ISP Mandamus Order* at ¶ 8

<sup>5</sup> Level 3 rests on its initial brief for its discussion of what the Commission should do if it determines that the *ISP Mandamus Order* does not extend Section 251(b)(5) to VNXX traffic. As we stated there, in that case the unquestionably interstate nature of ISP-bound traffic (including VNXX traffic) means that the Commission has no jurisdiction to address compensation for that traffic at all, *unless* the traffic is encompassed within the parties' interconnection agreement in some way. Level 3 Initial Brief at 12-16. The only way that could happen is if the Commission were to find that VNXX traffic falls within the rubric of "EAS/local" traffic referred to in the parties' agreement. *See id.*

grounds that Section 251(g) was designed to protect the preexisting access charge “regimes” that had been in place when the 1996 Act was passed. It followed, the FCC thought, that any traffic that would have been subject to access charges under those preexisting “regimes” was excluded from Section 251(b)(5). It then created a special regime – based entirely on its authority under Section 201 of the Act – for intercarrier compensation for ISP-bound traffic.<sup>6</sup>

In 2002, the D.C. Circuit flatly rejected the FCC’s expansive view of Section 251(g). The FCC had taken the view that Section 251(g) applies to any type of traffic – even traffic types that did not exist before the 1996 Act – to which access charges would have applied under the pre-Act access “regime.” Rejecting that view, the D.C. Circuit made clear that Section 251(g) is a “transition” mechanism, pure and simple. It *only* applies to the application of access charges for traditional, plain old long distance calls routed from one LEC, to an IXC, to another LEC. It does not apply to LEC-to-LEC compensation at all, and does not apply to traffic types – such as ISP-bound traffic – for which there was no intercarrier compensation rule in place when the 1996 Act was passed. That is, the FCC may not interpret or modify the pre-1996-Act compensation regime (access charges) in a manner that overrides the new provisions of the 1996 Act

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<sup>6</sup> Level 3 believed, and believes, that this compensation mechanism included VNXX ISP-bound traffic, and we do not waive that claim here. However, we recognize that the federal district court ruled that VNXX ISP-bound traffic was not covered by the FCC’s 2001 compensation regime, so, while not waiving that claim, will not re-argue it here. That said, we note that in a very recent Ninth Circuit case, that court described the 2001 *ISP Remand Order* as addressing “the reciprocal-compensation rate applicable when traffic delivered to an Internet service provider (“ISP”) crosses networks owned by more than one LEC.” *Global NAPs California, Inc. v. Public Utilities Commission of California*, No. 09-55600, slip op. (9<sup>th</sup> Cir. October 28, 2010) at footnote 6. Nothing in that characterization suggests that the Ninth Circuit believed or believes that the FCC’s rulings regarding compensation for ISP-bound calls are limited to those in which the ISP is geographically “local” to the calling party. The FCC’s most recent court filing on this issue – its opposition to a petition to have the Supreme Court review the *ISP Mandamus Order* – is quite similar in its careful avoidance of any suggestion that the *ISP Mandamus Order* is limited to geographically “local” ISP-bound calls. *See infra*.

(reciprocal compensation). This means that the pre-1996-Act regime cannot be construed to apply to traffic types and interconnection arrangements that did not exist prior to the Act.<sup>7</sup>

Because the FCC had so badly botched its reading of Section 251(g), the court reversed that aspect of the *ISP Remand Order* and directed the FCC to provide a new, coherent legal rationale for setting special rates for compensation for ISP-bound traffic – a rationale that would not rely on Section 251(g).

In response, the FCC fundamentally expanded and clarified its understanding of the scope of Section 251(b)(5) in the *ISP Mandamus Order*. The FCC made clear that reciprocal compensation applies to *all* traffic of *any* type exchanged between a LEC and *any* other carrier – which is really just what Section 251(b)(5) says – except for traffic covered by Section 251(g) – *as the D.C. Circuit had construed Section 251(g)*.<sup>8</sup> Therefore, the only traffic covered by Section 251(g) is plain-vanilla long distance traffic, dialed on a “1+” basis, and handed off from an originating LEC, to an IXC, to a terminating LEC. Everything else – including VNXX traffic – is subject to Section 251(b)(5).<sup>9</sup>

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<sup>7</sup> *WorldCom v. FCC*, 288 F.3d at 433 (under the FCC’s erroneous reading of Section 251(g), “it could override virtually any provision of the 1996 Act so long as the rule it adopted were in some way, however, remote, linked to LECs’ pre-Act obligations”).

<sup>8</sup> *ISP Mandamus Order* at ¶ 16 (expressly acknowledging that *WorldCom* narrowed Section 251(g) and expressly found that it could not apply here because “there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic”) (*quoting WorldCom*, 288 F.3d at 433) (emphasis added to *WorldCom* quote by the FCC).

<sup>9</sup> That is, as noted above, it is impermissible to “interpret” or “expand” the pre-Act access charge “regime” so as to cover new types of traffic and serving arrangements that did not exist until after the Act was passed, because that would have the effect of using Section 251(g) – again, merely a “transitional” mechanism – to “override” the new substantive requirements of the Act.

## 2. Qwest's Argument Ignores the Court's Limiting Construction of Section 251(g).

Qwest's argument proceeds as though the D.C. Circuit's limiting construction of Section 251(g) never happened.<sup>10</sup> Hoping to avoid the limiting construction, Qwest opens its argument with a long quote from the part of the *ISP Remand Order* where the FCC articulated its broad statement that Section 251(b)(5) was not intended to cover traffic that would have been covered by interstate or intrastate access "regimes."<sup>11</sup> The Commission must reject Qwest's argument because the very concept upon which Qwest relies – that the FCC's new approach to compensation for ISP-bound traffic involved *expanding* the access regimes preserved under Section 251(g) – is precisely the one the DC Circuit rejected.<sup>12</sup>

As the court found, Section 251(g) "is worded simply as a transitional device, preserving various LEC duties that antedated the 1996 Act."<sup>13</sup> Thus, "on its face, §251(g) appears to provide simply for the 'continued enforcement' of certain pre-Act regulatory 'interconnection restrictions and obligations.'"<sup>14</sup> As a result, because it was "uncontested" that "there had been

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<sup>10</sup> It actually goes further, and relies upon positions in certain FCC briefs that the Court expressly rejected. *See infra* note 33.

<sup>11</sup> Qwest Initial Brief at 4, quoting *ISP Remand Order* at ¶ 37.

<sup>12</sup> This is the essence of Qwest's rhetorical sleight-of-hand. Qwest implies that the test under Section 251(g) is not whether the traffic flows directly between a LEC and an IXC and whether there were actual, specific, pre-Act rules governing compensation for it (as the D.C. Circuit held). Instead, under Qwest's approach, the question is whether, *had* the traffic in question existed prior to the 1996 Act, *would it have been* subject to access charges *at that time*? This formulation, of course, stacks the deck – prior to the 1996 Act, LEC-to-LEC interconnection barely existed, and LECs would aggressively impose access charges on anything that was not the purest of purely local traffic. This allows Qwest to claim with a straight face that – even though the FCC made as clear as could be in the *ISP Mandamus Order* that Section 251(b)(5) is *not* limited to "local" traffic – that, in fact, it really is – because pre-Act, access charges would have applied to everything else.

<sup>13</sup> *WorldCom*, 288 F.3d at 430.

<sup>14</sup> *WorldCom*, 288 F.3d at 432.

no pre-Act obligation relating to intercarrier compensation for ISP-bound traffic,”<sup>15</sup> when it comes to intercarrier compensation for such traffic, Section 251(g) has no application. For such traffic, there was “no pre-Act obligation” for Section 251(g) to “preserve.”

In other words, the question is not whether dialup calls between Qwest and Level 3 are “local” or “not local” – designations that arise from Qwest’s state tariffs, not the governing federal law of intercarrier compensation. Designations such as “local traffic,” “access traffic,” and “interexchange traffic” – along with any other legacy category derived from pre-1996-Act retail rate regulation – simply do not apply outside of the confines of Section 251(g). Those terms are relevant to how the legacy access charge regime works, not to how Section 251(b)(5) applies to new types of traffic.

But even beyond that, the court found that relying on Section 251(g) to exclude *any* LEC-to-LEC traffic from Section 251(b)(5) was invalid, because of “the fact that §251(g) speaks only of services provided ‘to interexchange carriers and information service providers’; LECs’ services to other LECs, *even if en route to an ISP*, are *not* ‘to’ either an IXC or to an ISP.”<sup>16</sup> That is, Section 251(g) might preserve pre-Act compensation obligations in the context of an IXC buying services from an ILEC, or an ISP buying services from an ILEC, but has no application whatsoever to compensation obligations between two LECs such as Qwest and Level 3, *even if the traffic is “en route” to an ISP*. As a result, the D.C. Circuit found that the FCC was “precluded” from relying on Section 251(g) to exempt LEC-to-LEC ISP-bound traffic from

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<sup>15</sup> *WorldCom*, 288 F.3d at 433.

<sup>16</sup> *WorldCom*, 288 F.3d at 433-34 (emphasis added).

the scope of Section 251(b)(5).<sup>17</sup> As we noted in our opening brief, the Ninth Circuit also clearly accepts this understanding.<sup>18</sup>

**3. Qwest's Claim That "Interexchange" ISP-Bound Traffic Is Not Subject To Section 251(b)(5) Argument Ignores The Language Of The *ISP Mandamus Ruling* And Qwest's Own Statements To The FCC.**

Despite the fact that the FCC (and, therefore, state regulators) are now precluded from relying upon Section 251(g) to determine intercarrier compensation for ISP-bound traffic, and despite the fact that the FCC plainly rejected Qwest's reasoning by explicitly stating in the *ISP Mandamus Order* that Section 251(b)(5) "is not limited geographically ('local,' 'intrastate,' or 'interstate') or to particular services ('telephone exchange service,' 'telephone toll service,' or 'exchange access'),"<sup>19</sup> or to particular types of carriers,<sup>20</sup> Qwest nonetheless asks this Commission to rule that under the *ISP Mandamus Order*, VNXX ISP-bound traffic is carved out of Section 251(b)(5), by Section 251(g), because that traffic is, geographically, not "local" (based on the location of the ISP). It is hard to imagine a more blatant invitation to error than that contained in Qwest's brief. Qwest is asking this Commission to adopt the same overly broad view of Section 251(g) that the FCC adopted in 2001 – a view which led to a clear and unequivocal reversal by the D.C. Circuit in *WorldCom*.<sup>21</sup>

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<sup>17</sup> *WorldCom*, 288 F.3d at 430. In the *ISP Mandamus Order*, the FCC finally realized that traffic could be jurisdictionally interstate in nature – like ISP-bound traffic – and therefore subject to FCC authority under Section 201 of the Act, **and at the same time** also be a form of "telecommunications" subject to Section 251(b)(5). This realization allowed the FCC to see that it could fully include ISP-bound calling within the scope of intercarrier compensation under Section 251(b)(5), but also, at the same time, exercise its Section 201 authority to dictate a special compensation regime for this traffic to apply under Section 251(b)(5).

<sup>18</sup> See *Pacific Bell v. PacWest*, 597 F.3d 1114, 1122-23, 1130 n.14, 1131 (9<sup>th</sup> Cir. 2003).

<sup>19</sup> *ISP Mandamus Order* at ¶ 8 (footnotes omitted).

<sup>20</sup> *Id.* at ¶ 10.

<sup>21</sup> As we anticipated in our opening brief, Qwest relies heavily on the 1<sup>st</sup> Circuit's ruling in the *Global NAPs* case to support its view that the *ISP Mandamus Order* does not reach VNXX calls. See (note continued)...

At the outset, consider the following: Qwest's entire case against treating VNXX ISP-bound traffic as falling within Section 251(b)(5) is based on the idea that such traffic is "interexchange" rather than "local" in nature. That distinction fails to carry Qwest's case. In the *ISP Mandamus Order*, the FCC characterized ISP-bound traffic as "*interstate, interexchange* traffic."<sup>22</sup> In other words, the FCC fully understood that *all* ISP-bound traffic is necessarily "interexchange" (and, indeed, "interstate"). In fact, the FCC *relied upon* the "interstate, interexchange" nature of this traffic to justify applying a special, federally-mandated rate to it (\$0.0007/minute), rather than higher state-established reciprocal compensation rates. The only reason the \$0.0007 rate applies, in other words, is *because* the traffic is "interstate" and "interexchange" in nature. Qwest's claim that the \$0.0007 rate does *not* apply to some ISP-bound traffic (VNXX traffic) because *that* traffic is "interexchange" in nature ignores, and is completely inconsistent with, what the FCC actually said.

It is also inconsistent with what *Qwest* has said in the past. In the proceedings before the FCC in response to the D.C. Circuit's mandamus ruling – that is, the proceedings that led to the *ISP Mandamus Order* – Qwest acknowledged that all ISP-bound traffic could be addressed under Section 251(b)(5).<sup>23</sup> Indeed, in rejecting the concept that Section 251(b)(5) was limited to

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... (note continued)

Qwest Initial Brief at 7, 10-12. For the reasons we explained there, the 1<sup>st</sup> Circuit is wrong, and the Commission should not follow it. See Level 3 Initial Brief at 10-11.

<sup>22</sup> *ISP Mandamus Order* at ¶ 6 (emphasis added).

<sup>23</sup> See *ISP Mandamus Order* at ¶ 7 ("Nevertheless, we find that the better view is that section 251(b)(5) is not limited to local traffic"). In footnote 25 (attached to the sentence just quoted), the FCC cites, in part, a *Qwest* filing. *Id.* at ¶ 7 n.25, citing Qwest, Legal Authority for Comprehensive Intercarrier Compensation Reform 2-4 (Qwest White Paper), attached to Letter from Melissa Newman, Counsel for Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 06-45, 99-68, WC Docket Nos. 04-36, 05-337, 05-195, 06-122 (filed Oct. 7, 2008) (Qwest Oct. 7, 2008 *Ex Parte* Letter) Among other things, in that filing Qwest stated that the FCC "is free to determine that section 251(b)(5) of the Act applies to all telecommunications traffic" – which is what the FCC did in the *ISP Mandamus Order*.

(note continued)...

local traffic, the FCC specifically cited to Qwest's White Paper in support of the conclusion that the expansive scope of Section 251(b)(5) – *i.e.*, the fact that it covers all “telecommunications” – encompasses all LEC-to-LEC traffic regardless of legacy billing concepts associated with “local”, “non-local”, “VNXX”, or “interexchange” designations.<sup>24</sup> These legacy billing concepts do not and cannot have any force under Section 251(b)(5).

#### 4. The ESP Exemption has Nothing to do with This Case.

Qwest dresses up its invitation to error by tying it to the hoary “ESP Exemption” from access charges.<sup>25</sup> Under that FCC doctrine, an Enhanced Service Provider (ESP) is entitled to connect to the public network on the same terms as an end user, by buying a local intrastate business line from a LEC. It is probably true that Section 251(g) “preserves” the right of ESPs to purchase such connections to the network on those terms, because the right of ESPs to connect in that way existed at the time of the passage of the Act.<sup>26</sup> But the suggestion that the ESP Exemption somehow applies to this case is absurd. First, that doctrine relates to the rights of ESPs as against ILECs, which is very different from the LEC-to-LEC compensation situation at

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... (note continued)

Qwest was arguing, then, for a regime in which all 251(b)(5) traffic – whether local or non-local – would be subject to bill and keep. While the FCC rejected that suggestion, there can be no question that Qwest itself has already conceded that Section 251(b)(5) can apply to *all* telecommunications traffic, including the ISP-bound traffic that was specifically at issue in the proceeding in which it filed its White Paper. *See* Qwest Oct. 7, 2008 *Ex Parte* Letter at p. 3. Again, as Qwest noted to the FCC, “the Commission is at liberty to revisit its prior determination and to hold that sections 251(b)(5) and 252(d)(2) *in fact apply to all traffic involving a LEC* or commercial mobile radio service (‘CMRS’) provider. *Nothing in the term ‘transport and termination’ on its face limits section 251(b)(5) to local traffic*, as all calls will ‘terminate’ somewhere.” *Id.* (emphasis added).

<sup>24</sup> See *id.*

<sup>25</sup> See Qwest Initial Brief at 13-14.

<sup>26</sup> Section 251(g) preserves pre-Act obligations of LECs regarding, among other things, the provision of “information access” to “information service providers.” “Enhanced Service Provider” is the pre-Act term for “information service providers,” and it is uncontested that ISPs fall into this category. It is not unreasonable to view the ESP exemption as a form of access right that ISPs had before the 1996 Act.

issue here.<sup>27</sup> Second, if the ESP exemption could be applied to solve the problem of LEC-to-LEC compensation for ISP-bound traffic, the FCC's 11-year journey into this thicket would have been entirely unnecessary. It simply could have said in its original ruling, in 1999, that ISPs should be treated as end users, with reciprocal compensation applying (or not) based on the ISP's location. Not only did the FCC not adopt this viewpoint, it expressly rejected it, holding that despite the availability of the ESP Exemption to ISPs, that doctrine did not resolve the very different question of LEC-to-LEC intercarrier compensation for ISP-bound calls.<sup>28</sup>

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<sup>27</sup> See *WorldCom*, 288 F.3d at 433-34. We note that Qwest tries to characterize Level 3 as an "interexchange carrier" by virtue of its handling of VNXX traffic. See Qwest Initial Brief at 6. Qwest's wishing will not make it so. Level 3 is certificated as a CLEC; it established interconnection arrangements with Qwest under the auspices of its LEC-to-LEC interconnection agreement; and this dispute arose out of the interpretation of an amendment to that agreement. Moreover, in adjudicating the initial appeal of this case, the federal district court characterized Level 3 as a CLEC. *Qwest Corp. v. ACC et al.*, Order, Case No. CV-06-2130-PHX-SRB (March 6, 2008) at 2. The Commission has repeatedly rejected Qwest's attempts to characterize Level 3 as an IXC. See, e.g. *In the Matter of the Petition of Level 3 Communications LLC for Arbitration of an Interconnection Agreement With Qwest Corporation Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket Nos. T-03654A-05-0350, T-01051B-05-0350, Decision No. 68817 (Az. Corp. Comm'n, June 29, 2006) (rejecting Qwest's positions that VNXX ISP-bound traffic is interexchange and subject to IXC compensation rules). In a testament to perseverance, Qwest raised these same allegations again in this case, alleging in their request for rehearing that "NXX disguises interexchange traffic to make it appear to be local". *Level 3 Communications LLC v. Qwest Corporation*, Docket Nos. T-01051B-0415, T-03654A-05-0415, Qwest Corporation's Application for Rehearing and Modification of Order (Az. Corp. Comm'n August 15, 2006). This case involves compensation arrangements between two LECs, not between a LEC and an IXC.

<sup>28</sup> See Implementation of the Local Competition Provisions in the Telecommunications Act of 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) at ¶ 16. The logical implication of Qwest's position that a "local" ISP should be viewed as an end user is that, for ISP-bound traffic where the ISP is located in the originating caller's local calling area, the intercarrier compensation rate should be the normal state-established reciprocal compensation rate, rather than the FCC's special, low \$0.0007/minute rate. Qwest is happy to cede control over ISP-bound traffic to the FCC when it saves Qwest money, but is evidently eager to deny federal control over this traffic when federal control would cost money. In fact, Qwest's unwillingness to offer higher, state-established reciprocal compensation rates for whatever geographically "local" ISP-bound traffic might exist shows that it lacks the courage of its convictions regarding the relevance of the ESP Exemption. In this regard, we note that the ISP Mandamus Order contains **no mention whatsoever of the ESP Exemption on which Qwest relies**. If the FCC thought that that legacy doctrine were relevant to understanding the scope of its new compensation regime, surely it would have said something about it.

5. **The Legal Logic of the *ISP Mandamus Order* Applies Even if the FCC Was Focused on Geographically “Local” ISP-Bound Calls (Which It Was Not).**

Even if Qwest is correct that the original problem that started the FCC down the path leading to the *ISP Mandamus Order* was how to handle geographically “local” calls to ISPs, that is irrelevant in resolving the case now before this Commission.<sup>29</sup> In the *ISP Mandamus Order*, the FCC was not adjudicating a specific dispute between private parties about compensation for ISP-bound calling – “local” or otherwise. It was responding to a directive from a federal appeals court to provide a legal rationale for a new intercarrier compensation regime. That legal rationale explains what the FCC thinks Section 251(b)(5) means and how ISP-bound calling fits into it.<sup>30</sup> As noted above, the FCC said that Section 251(b)(5) “is not limited geographically (‘local,’ ‘intrastate,’ or ‘interstate’) or to particular services (‘telephone exchange service,’ ‘telephone toll service,’ or ‘exchange access’),”<sup>31</sup> or to particular types of carriers.<sup>32</sup> It covers *everything* not carved out by Section 251(g), and, as we have seen above, Section 251(g) has been authoritatively construed by the courts as narrow, not broad. Because Section 251(g) does not apply to LEC-to-LEC traffic in general or to ISP-bound traffic in particular, the legal effect

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<sup>29</sup> Level 3 does not agree with Qwest that either the 2001 *ISP Remand Order* or the 2008 *ISP Mandamus Order* dealt only with “local” ISP-bound calls, but, for the reasons described here, the result in this case is the same even if they were so limited.

<sup>30</sup> In this regard, the Ninth Circuit recognizes the difference between a regulatory body adjudicating a specific dispute between private parties (which results in a decision applicable to those parties only) and acting in its rulemaking capacity (which results in a decision of general applicability to all situations covered by the rule). See *Global NAPs California v. California PUC*, *supra*, slip op. at ¶ [10] (noting distinction between adjudication and rulemaking), and discussing *Pacific Bell v. Pac West Telecomm, Inc.*, 352 F.3d 1114, 1128-29 (9<sup>th</sup> Cir. 2003) (same). The fact that the FCC was providing a generally applicable legal explanation of how Section 251(b)(5) works (and the correspondingly limited reach of Section 251(g)), not just resolving some specific private dispute, means that its reasoning must be applied to all situations to which it applies.

<sup>31</sup> *ISP Mandamus Order* at ¶ 8 (footnotes omitted).

<sup>32</sup> *Id.* at ¶ 10.

of the FCC's new rationale is to sweep all LEC-to-LEC ISP-bound traffic – including VNXX traffic – within the scope of Section 251(b)(5).<sup>33</sup>

Qwest's insistence that the various intermediate points within the network matter – the location of an ISP, the location of equipment Level 3 uses to provide service to ISPs, or anything

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<sup>33</sup> Had the FCC wanted to limit its new understanding of Section 251(b)(5) to “local” ISP-bound traffic, surely it would have said so. A simple statement that it was leaving to another day the question of non-local ISP-bound traffic would have been sufficient. But no such statement appears in the *ISP Mandamus Order*. In this regard, Qwest's citation of two FCC briefs does not help its cause. In the FCC's 2007 brief to the D.C. Circuit opposing a mandamus petition, the agency's counsel simply stated that its ruling in response to a writ of mandamus “would not necessarily resolve any controversy concerning VNXX calls.” Opposition of [the FCC] to Petition for a Writ of Mandamus, Case No. 07-1446 (D.C. Cir.) (filed December 27, 2007) at 26. Obviously, counsel's predictions in 2007, in *opposing* a mandamus order, have no bearing on the proper interpretation of what the agency actually *did* in 2008, in *responding to* a mandamus order. Similarly, in the FCC's 2009 brief to the D.C. Circuit defending the *ISP Mandamus Order*, while agency counsel did suggest that the agency had not affirmatively and expressly applied Section 251(b)(5) to “non-local” VNXX traffic, it immediately followed up that observation with a full-throated defense of the agency's conclusion that Section 251(b)(5) applies even to non-local traffic. Brief for [the FCC], Case Nos. 08-1365 *et al.*, (D.C. Cir.) (filed May 1, 2009) at 45-46. On appeal, the D.C. Circuit found that where a call to an ISP might be deemed to “terminate” has no bearing on the FCC's authority to establish compensation for ISP-bound traffic, and so did not expressly address that aspect of the FCC's ruling – even as it affirmed that ruling in full. *Core Communications v. FCC*, 592 F.3d 139, 144 (D.C. Cir. 2010). The logical conclusion from this combination of briefing and affirmance is that agency counsel fully understood that the FCC had flatly stated that Section 251(b)(5) is not limited to local traffic, vigorously defended that view on appeal, and won an affirmance of the agency's order.

This understanding is confirmed by the FCC's most recent court briefing on this issue. Opposing any need for Supreme Court review of the *ISP Mandamus Order*, the FCC characterized that ruling as follows: “This case involves payments made between *carriers that cooperate to carry ‘dial-up’ traffic between customers and the Internet*. Under a typical dial-up arrangement, a customer of an Internet Service Provider (ISP) directs his or her computer modem to *dial a telephone number*, thereby using the telephone network of his local exchange carrier, as well as the network of the carrier providing service to the ISP. The ISP, in turn, enables the customer to access Internet content and services from distant websites over the telephone connection.” Brief for the Federal Respondents in Opposition, *Core Communications v. FCC et al.*, Nos. 10-185 & 10-189 (U.S. Supreme Court filed October 2010), at 4 (*emphasis added*). Later in the same brief the FCC states that “The FCC order at issue here concerns only *dial-up Internet access*, which is a small and steadily shrinking percentage of the Internet access market due to the rapid growth of broadband Internet services.” *Id.* at 23 (*emphasis added*). If the FCC believed that its order was limited to “local” dial-up traffic it surely would have said so at one of these points in its brief. Instead, it refers to all “dial-up Internet access” indiscriminately, and, indeed, refers to carrying such dial-up traffic “between customers and the Internet,” noting that the only requirement is that the customer “dial a telephone number” – pointedly missing any reference to a *local* telephone number. To the extent that FCC court filings on this issue are relevant, therefore, the most recent such filing – made to the highest court in the land – provides no support whatsoever for the view that the FCC meant the *ISP Mandamus Order* to be limited to geographically “local” traffic.

else related to the technical manner in which one provider enables the functionalities used to provide Internet access to those who without affordable broadband service – is, therefore, simply wrong. Qwest relies on an artifice of language to pretend that an admittedly interstate service, subject to federal jurisdiction, and governed by federal law (Section 251(b)(5)) is somehow “really” subject to the rules of state-based retail tariffs.

The *ISP Mandamus Order* is the FCC’s authoritative statement regarding the scope of Section 251(b)(5). The FCC declared all ISP-bound traffic to be “interexchange” and “interstate” in nature, and, based on that declaration, established its \$0.0007/minute compensation system.<sup>34</sup> Both because the traffic is interstate and because states are obliged to follow FCC rulings regarding intercarrier compensation (*see* Section 252(c)(1)), there can be no question that the FCC’s statement of the scope of Section 251(b)(5) is now binding on all state Commissions interpreting the Act. And as shown here and in our initial brief, that legal rationale plainly and without question extends to *all* ISP-bound traffic, VNXX or otherwise, that LECs might exchange with each other. As a result, once it is established in this case that (a) all of the traffic at issue between Level 3 and Qwest is locally-dialed ISP-bound traffic, and (b) all of it flows directly from an ILEC (Qwest) to a CLEC (Level 3), the legal question is resolved, and 100% of the traffic is subject to the FCC’s pricing regime. It does not matter what specific

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<sup>34</sup> If we indulge Qwest’s assumption that the FCC, in the *ISP Mandamus Order*, was focused on only “local” ISP-bound traffic, that makes the FCC’s declaration that this traffic is “interstate” and “interexchange” in nature all the more devastating to Qwest’s position. Indulging Qwest’s assumption, even ISP-bound traffic where the ISP is next door to the caller is subject to the FCC’s compensation regime because, geography notwithstanding, this is “interstate, interexchange” traffic. If the ISP is located somewhere else, the “interstate, interexchange” nature of the traffic is only confirmed, not undermined, meaning that this would only *strengthen* the case for applying the FCC’s compensation regime. In this regard, as noted in the immediately preceding footnote, the FCC now characterizes the traffic at issue as involving customers “dialing a telephone number” in order to carry traffic “between customers and the Internet.” This characterization fits perfectly with the understanding that the *ISP Mandamus Order* covers all ISP-bound traffic. It makes little sense if the FCC “really” intended that order to be limited in some way by the happenstance of the location of ISP.

words the FCC (or Qwest) might use (or not use) to describe or characterize the traffic. All that matters is that the traffic is exchanged between LECs and bound for the Internet via a dial-up connection. Compensation for such traffic cannot be covered by Section 251(g) because that traffic did not exist, and compensation obligations regarding it did not exist, prior to the 1996 Act. Because it is a new type of traffic, it is covered by the FCC's special compensation regime. It really is that simple.

**B. Even Though the *ISP Mandamus Order* was Issued in 2008, its Rationale Applies to This Case.**

Qwest argues that the *ISP Mandamus Order* does not apply retroactively to this case, but its argument ignores both the context of the issuance of that order, as well as settled Ninth Circuit law. As described above and in our opening brief, in 2002, the D.C. Circuit rejected the FCC's reliance on Section 251(g) to limit the scope of Section 251(b)(5). In doing so, the court directed the FCC to supply a valid legal rationale for its decision in the 2001 *ISP Remand Order* to treat ISP-bound calls differently from "plain-vanilla" local calls for purposes of intercarrier compensation.<sup>35</sup> In 2008, after the FCC had dithered for six years, the D.C. Circuit ordered the FCC to fulfill the directive of *WorldCom*, and provided strict deadlines for compliance.<sup>36</sup> With the threat of complete vacatur of its *ISP Remand Order* looming, the FCC finally supplied the required legal rationale for its *ISP Remand Order* of 2001 in its *ISP Mandamus Order* of 2008. The rationale supplied by the *ISP Mandamus Order*, therefore, necessarily applies to intercarrier compensation issues that arose during the period of uncertainty (2002-2008), both because it was

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<sup>35</sup> *WorldCom*, 288 F.3d at 434.

<sup>36</sup> This is why the ruling is known as the "*ISP Mandamus Order*" – it was issued in response to a direct command from the appeals court. See *In Re Core Communications*, 531 F.3d 849, 861-62 (D.C. Cir. 2008) (directing FCC to respond to *WorldCom* within six months of argument on the mandamus petition, or face complete vacatur of the *ISP Remand Order*).

issued precisely to provide a rationale for the compensation regime in effect at that time and because everyone knew the FCC's earlier position (from the 2001 *ISP Remand Order*) was no longer valid.

Of course, this just shows that it is particularly sensible, in this individual case, to apply the Ninth Circuit's rule for such questions, which is that the law applied at the time of a decision under the 1996 Act is the law as it exists at the time of the decision.<sup>37</sup> This Commission is not free to ignore the Ninth Circuit's rule on this point in any event, but the discussion above shows that the Ninth Circuit's rule is particularly appropriate in this case.<sup>38</sup>

Moreover, Qwest has known of this legal issue, and has been paying \$0.0007 in reciprocal compensation since 2001. This is not only nothing new, but Qwest readily conceded as much in filings to the FCC in the FCC's Core Mandamus proceedings on ISP-bound traffic:

Additionally, based on evidence in the record in this proceeding – and in particular the negotiated and arbitrated interconnection agreements that formed the basis for its adoption of an interim \$0.0007 rate for ISP-bound traffic and the fact that a great deal of traffic is today exchanged at this rate subject to the so-called ISP Remand Order's 'mirroring rule' – the Commission could determine that \$0.0007 per minute represents 'a reasonable approximation' of the relevant costs and apply that rate to all traffic.<sup>39</sup>

There is no legitimate legal, factual, policy or other grounds upon which Qwest can conceivably be heard to argue that some magic carve out for "local" or "non-local" ISP-bound traffic exists when, as a matter of law, the FCC's sole aim has been to handle all such traffic

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<sup>37</sup> *US WEST v. Jennings*, 304 F.3d 950 (9th Cir. 2002).

<sup>38</sup> The bulk of Qwest's argument in the section of its brief relating to the timing of the application of the *ISP Mandamus Order* amounts to arguments that on the merits that order does not apply to VNXX calls. See Qwest Initial Brief at 7-12. Obviously the question of whether the order applies to VNXX calls is different from the extent to which it operates retroactively in the circumstances of this case.

<sup>39</sup> Qwest Oct. 7, 2008 *Ex Parte* Letter at p. 10.

under a separate single rate. Indeed Qwest itself has not only benefitted from paying a lower single rate for such traffic, but has advocated to the FCC that all such traffic, whether local or not, is subject to a single statutory scheme under Section 251(b)(5). Qwest's contrary argument in this case is disingenuous at best.

### **III. THERE IS NO NEED FOR A HEARING IN THIS MATTER.**

There is no dispute as to any material fact that would justify the time and expense of an evidentiary hearing in this case.<sup>40</sup> No one disputes that the traffic at issue is dial-up traffic bound for ISPs. No one disputes that end users dial the calls at issue using normal local dialing patterns, not the "1+" dialing associated with toll calls. No one disputes that that the traffic at issue is delivered to Level 3 over interconnection arrangements established under the parties' interconnection agreement, not arrangements ordered out of Qwest's access tariffs. No one dispute that the traffic is physically routed in exactly the same way as purely traditional Qwest-Level 3 local calls would be delivered just as they had always been delivered under the relevant agreements. No one disputes that that the traffic at issue is treated as local, rather than toll or long distance, for purposes of billing Qwest's end users. And no one disputes that for the traffic at issue, the ISPs being called are physically located outside their Qwest-established traditional local calling zones.

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<sup>40</sup> See Qwest Initial Brief at p. 2 (asserting that the dispute involves "interexchange" traffic exchanged between the parties via interconnection and that the ISP is not located within the local calling area.); Staff Initial Brief at 5 (asking for a hearing to determine whether the traffic falls within 251(g), even though, for this to be an "interconnection" dispute at all, the only possible category for ISP-bound traffic exchanged directly between Level 3 and Qwest over LIS trunks is Section 251(b)(5)); Pac-West Initial Brief at p. 3 (noting that this is an interconnection dispute over reciprocal compensation due under the FCC's Part 51 rules involving ISP-bound calls that did not originate and terminate in the same local calling area, and that were locally dialed).

These undisputed facts are the only ones that are material to the resolution of the open issues in this case. Although Qwest says that the location of the modems serving the ISPs matters, Qwest itself conceded to the FCC that Section 251(b)(5) is not limited by any designation of “local” or “non-local;” rather, all ISP-bound traffic is covered.<sup>41</sup> As a result, there is no material factual dispute over the question of the “local” or “non-local” nature of the traffic because that distinction is simply not material to the FCC’s intercarrier compensation rules for ISP-bound traffic.

Qwest argues that four issues need clarification, but none of those issues warrants an evidentiary hearing.<sup>42</sup> Three of the four (where modems are located; what portion of traffic originated in Phoenix as opposed to more distant regions of the state; and whether any refunds might be due to Qwest) have been raised and re-raised by Qwest throughout the entire span of these proceedings. Qwest has repeatedly argued that Level 3 provides service to ISPs using what Qwest calls “Virtual NXX” services. But regardless of the legacy rating terms Qwest tries to apply to Level 3’s distributed softswitch network, the only question that remains is a legal one: what compensation should apply to ISP-bound traffic exchanged between an ILEC and a CLEC? Of course, a subsequent hearing may be required if the parties dispute the calculation of damages, but that should come, if at all, after the Commission rules on the merits.<sup>43</sup> In this regard, there are no material facts in dispute.

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<sup>41</sup> See note 23, *supra*.

<sup>42</sup> Qwest Initial Brief at 14.

<sup>43</sup> On that point, damages-related issues are obviously premature. Level 3 fully expects that, once the application of reciprocal compensation versus access charges is finally resolved, Qwest and Level 3 will be able to determine in good faith how much is due from one party to the other. If, at that future point, the parties need assistance from the Commission to resolve that issue, any necessary proceedings can be scheduled then.

Qwest's sole remaining "issue" does not rise to the level of a material dispute. Qwest apparently does not know "if Level 3 ... even terminated the traffic at issue," asserting that "in other states Level 3 witnesses have testified that Level 3 routes ISP traffic directly onto the Internet."<sup>44</sup> In raising this question, Qwest vaguely alludes to a possible argument that Qwest might not owe Level 3 for the ISP-bound traffic underlying this dispute on the notion that Level 3 does not really "terminate" the traffic in question. Qwest offers no citation for, or copy of, the supposed Level 3 testimony on which it relies.<sup>45</sup>

Even assuming that Qwest is allowed to raise a new defense at such a late stage in the proceedings, doing so in two short sentences, unsupported by an affidavit or other material, suggests that even Qwest does not believe it to be a material fact in dispute. If this supposed issue were that important, Qwest certainly would have called attention to it much sooner. The fact that Qwest raises a concern that Level 3 did not terminate the traffic now – after Level 3 has been billing Qwest for termination of ISP-bound traffic for more than a decade – suggests that it is not a material fact in that is relevant to the current legal dispute.<sup>46</sup>

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<sup>44</sup> Qwest Initial Brief at 14.

<sup>45</sup> Moreover, as noted above, Qwest conceded to the FCC that Section 251(b)(5) applies to all traffic not covered by Section 251(g) for the simple reason that it covers "transport and termination" of all calls, and "all calls will 'terminate' somewhere." Qwest White Paper. *See* note 23, *supra*.

<sup>46</sup> The Commission first addressed the question of how much Level 3 could charge Qwest for reciprocal compensation for Level 3's termination ISP-bound traffic originating from Qwest in 2001. *See In The Matter Of The Petition Of Level 3 Communications, LLC For Arbitration Pursuant To Section 253(B) Of The Communications Act Of 1934, As Amended By The Telecommunications Act Of 1996, With Qwest Corporation Regarding Rates, Terms And Conditions For Interconnection*, Docket Nos. T-03654A-00-0882, T-01051B-00-0882, Decision No. 63550 (Az. Corp. Comm'n, Apr. 10, 2001) (*Level 3 2001 Arbitration Decision*) ("It is Level 3's position that it performs a service for Qwest when it terminates calls placed by Qwest end-users to Level 3-served ISPs. These are calls that are placed by a Qwest customer who chooses to dial into an ISP. Level 3 contends that they are routed over the same interconnected local network just like any other local call, and they are calls that Qwest itself treats as local for retail purposes.") It is worth noting that in that ruling the Commission rejected Level 3's then-current view that ISP-bound traffic was "local in nature," but nevertheless ruled that Qwest should pay Level 3 reciprocal compensation for Qwest-originated ISP-bound traffic terminating to Level 3 according (note continued)...

Moreover, as the Commission has noted in other contexts, under the logic of all of the FCC's ISP orders as well as the recent FCC's *Time Warner Order*, an ILEC cannot avoid its interconnection obligations under federal law by attempting to recharacterize a CLEC as a non-carrier because the CLEC provides wholesale services to other entities.<sup>47</sup> So even if there could conceivably be some factual question over this point, as a legal matter, the question is moot. CLECs may offer wholesale services to other carriers and to ISPs, and remain CLECs.

Because the *ISP Mandamus Order* and the *Core* decision affirming it clarify that Section 251(b)(5) governs intercarrier compensation for all traffic bound for ISPs, it would be a waste of the Commission's and the parties' resources to hold a hearing to explore where Level 3's modems (or like facilities) are located, where Level 3's ISP customers are located, or whether the traffic originated and terminated in the same local calling area. Again, when the FCC characterized the traffic at issue, it called it "interstate, interexchange traffic."<sup>48</sup> Since the entire \$0.0007 compensation scheme only applies to "interstate, interexchange" traffic, Qwest's

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... (note continued)

to a step-down rate plan later adopted almost entirely without change by the FCC. *Id.* at p. 9.

<sup>47</sup> It has been well known both to the Commission and to the FCC that CLEC provision of ISP-bound services involves providing dial tone access to ISPs who connect telephone lines to the Internet. In the *ISP Mandamus Order*, for example, the FCC observed that CLECs provide termination because the LEC delivers traffic from the calling party through its switch to the called party, the ISP. *ISP Mandamus Order* at ¶ 2. See also *In The Matter Of Time Warner Cable Request For Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 Of The Communications Act Of 1934, As Amended, To Provide Wholesale Telecommunications Services To VoIP Providers*, Memorandum Opinion and Order, WC 06-55, DA 07-709, 22 FCC Rcd. 3513, 3571 ¶ 8 (March 1, 2007) ("Because the Act does not differentiate between retail and wholesale services when defining "telecommunications carrier" or "telecommunications service," we clarify that telecommunications carriers are entitled to interconnect and exchange traffic with incumbent LECs pursuant to section 251(a) and (b) of the Act for the purpose of providing wholesale telecommunications services.") In addition, both this Commission and the FCC have repeatedly rejected Qwest's (and other ILECs') attempts to recharacterize CLECs as IXCs by virtue of the fact that CLECs serve end users who happen to be enhanced service providers. As a result, any attempt on Qwest's part to question whether the traffic actually terminates is a red herring and must be disregarded.

<sup>48</sup> *ISP Mandamus Order* at ¶ 6.

questions are merely a smokescreen meant to distract attention from the essential legal question of the validity of the Commission's original ruling that all ISP-bound traffic exchanged directly between Level 3 and Qwest remains subject to the FCC's \$0.0007 per minute regime, following the *ISP Mandamus Order* and the *Core* decision.<sup>49</sup>

While no evidentiary hearing is needed, Level 3 recognizes that the Administrative Law Judge may well conclude that the resolution of the legal questions in this case would be assisted by oral argument. Level 3 has no objection to scheduling such an argument, if necessary. But, with no material facts in dispute, there is simply no need for discovery, the presentation of witnesses, cross-examination, etc.

For these reasons, there is clearly no basis for conducting discovery or holding an evidentiary hearing in this matter.

#### **IV. CONCLUSION**

The *ISP Mandamus Order* reaffirms that that all ISP-bound traffic is jurisdictionally interstate and interexchange in nature, and plainly holds that when that interstate, interexchange traffic is handed off between LECs, all of it is subject to Section 251(b)(5). As a result, the only reasonable determination in this case is that Section 251(b)(5) applies to all ISP-bound traffic directly exchanged between Level 3 and Qwest. There is simply no basis for excluding VNXX ISP-bound traffic from the reach of the statute. It follows, therefore, that Qwest owes Level 3

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<sup>49</sup> Compare Qwest's current position, for example, to their original position in 2001 for denying payment of compensation for ISP-bound traffic to Level 3: "Qwest contends that reciprocal compensation only applies to local calls and that ISP traffic is interstate in nature." *Level 3 2001 Arbitration Decision* at p. 6. The only thing that has been consistent in Qwest's position is their refusal to pay terminating reciprocal compensation for ISP-bound traffic, coupled with their repeated attempts to convert any CLEC whose customers include Enhanced Service Providers such as ISPs, into IXC's so that Qwest can try to collect access charges from them, rather than pay the reciprocal compensation fees that Qwest owes.

compensation for all VNXX ISP-bound traffic directly exchanged between the two carriers in accordance with the FCC's special compensation rates established for that traffic.

Conceivably, as we discussed in our opening brief, the Commission could conclude that VNXX ISP-bound traffic falls within the meaning of the term "EAS/local" traffic used in the parties' ICA, and reaffirm that compensation is due on that basis. However, the Commission may not (a) rule that VNXX ISP-bound traffic is not subject to Section 251(b)(5), (b) rule that this traffic is not covered by the terms in the parties' ICA, but then (c) establish some freestanding compensation mechanism for it. This is because the FCC has plainly and conclusively classified ISP-bound traffic as interstate in nature, so the only way the Commission can obtain any jurisdiction over it is via the Section 251/252 interconnection agreement process.

Finally, the scope of the FCC's rulings means that the Commission may not properly open up factual inquiries into whether or not ISP-bound traffic is "VNXX" in nature, whether or not it is terminated within or without the state, or even terminated to a different party. All of these questions are subsumed under the undisputed fact that the traffic is dial-up Internet-bound traffic, and therefore jurisdictionally interstate.<sup>50</sup> The interstate nature of the traffic means that the Section 251/252 interconnection process is the only basis on which the Commission could acquire jurisdiction over it.

For these reasons, Level 3 requests that the Commission proceed to address this case on the briefs, and only after the legal questions are resolved should the Commission address any further factual inquiries that may exist, in a subsequent damages phase of the case.

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<sup>50</sup> As the FCC noted in the *ISP Mandamus Order*, "The court did not question the Commission's finding that ISP-bound traffic is interstate." *ISP Mandamus Order* at ¶ 2.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of November, 2010.

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