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BEFORE THE ARIZONA CORPORATION COMMISSION

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| PAC-WEST TELECOMM, INC. |) | DOCKET NO. T-01051B-05-0495 |
| |) | DOCKET NO. T-03693A-05-0495 |
| Complainant, |) | |
| |) | |
| vs. |) | |
| |) | |
| QWEST CORPORATION, |) | |
| |) | |
| Respondent. |) | |
| |) | |
| LEVEL 3 COMMUNICATIONS, LLC |) | DOCKET NO. T-03654A-05-0415 |
| |) | DOCKET NO. T-01051B-05-0415 |
| Complainant, |) | |
| |) | |
| vs. |) | |
| |) | |
| QWEST CORPORATION, |) | |
| |) | |
| Respondent. |) | |
| |) | |

LEVEL 3 COMMUNICATIONS, LLC 'S
SUPPLEMENTAL AUTHORITY
AND SUPPLEMENTAL ARGUMENTS

Arizona Corporation Commission

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TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | Background..... | 1 |
| II. | Level 3's Supplemental Argument and Authorities | 2 |
| | A. Level 3's Position Remains as Stated in its Briefing from 2010..... | 2 |
| | B. If VNXX ISP-Bound Traffic is not Covered by Section 251(b)(5), then the Commission Lacks Jurisdiction to Set an Intercarrier Compensation Rate for Such Traffic. | 3 |
| | C. Even if the ISP Mandamus Order does not Literally Control the Question of Intercarrier Compensation for VNXX ISP-Bound Traffic, the Most Logical Application of that Ruling Leads to the Conclusion that Such Traffic is Subject to Reciprocal Compensation under Section 251(b)(5)..... | 5 |
| | D. A Ruling that VNXX ISP-Bound Traffic is not Covered by Section 251(b)(5) would Raise a Host of Complex Legal and Factual Questions | 8 |
| III. | Conclusion | 11 |

I. BACKGROUND.

Level 3 Communications, LLC (“Level 3”) submits this statement of Supplemental Authority and Supplemental Arguments, pursuant to the Procedural Order dated March 20, 2012, issued by Administrative Law Judge Rodda in the above-captioned consolidated proceedings.

This proceeding relates to intercarrier compensation due between Level 3 and Qwest Corporation (“Qwest”) for VNXX traffic during the period from October 8, 2004 (the effective date of the FCC’s *Core Forbearance Order*¹) through January 8, 2007 (the effective date of the parties’ current interconnection agreement (“ICA”)). In Order No. 68855 in this proceeding, dated July 28, 2006, the Commission directed Qwest to pay \$0.0007 per minute for such traffic. This ruling was based on the conclusion that the FCC’s use of the term “ISP-bound traffic” in the 2001 *ISP Remand Order*² included VNXX traffic. Qwest appealed, and the United States District Court for the District of Arizona found that the Commission’s conclusion was in error. *Qwest Corporation v. ACC et al.*, No. CV-06-2130-PHX-SRB, *slip op.* (March 6, 2008).

The court’s ruling did not determine or prejudge what compensation *was* due for VNXX ISP-bound traffic. The court stated that the Commission “may find that VNXX is local;” it may find that VNXX “is subject to access charges;” or the Commission may “opt for some other yet-to-be-defined rate scheme that [it] deems appropriate.” *Qwest v. ACC*, *slip op.* at 22-23. In other words, the court found that the FCC’s *ISP Remand Order* did not expressly decide the question of compensation for VNXX traffic.

¹ *Petition of Core Communications*, Order, 19 FCC Rcd 20179 (2004).

² Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) (“*ISP Remand Order*”).

On August 23, 2010, the Commission issued a procedural order directing briefing regarding the issues on remand from the District Court. *Pac-West Telecomm, Inc. v. Qwest*, Procedural Order, Docket No. T-01051B-05-0495 *et al.* (August 23, 2010). The parties and staff filed initial and reply briefs in October and November 2010, respectively.

As noted above, on March 20, 2012, Administrative Judge Rodda issued a procedural order calling for the parties to submit supplemental arguments and authorities in advance of oral argument, presently scheduled for June 12, 2012.

II. LEVEL 3's SUPPLEMENTAL ARGUMENTS AND AUTHORITIES.

A. Level 3's Position Remains As Stated In Its Briefing From 2010.

In its earlier briefing, Level 3 explained that the FCC's *ISP Mandamus Order*,³ issued in November 2008, shows that the Section 251(b)(5) reciprocal compensation regime applies to all ISP-bound traffic, including VNXX traffic. Unlike in prior orders (such as the *ISP Remand Order*), the *ISP Mandamus Order* does not characterize its ruling as relating exclusively, "typically," or at all, to the limited situation in which an ISP's equipment is located in the same local calling area as the end user dialing in to the ISP.⁴ To the contrary, the *ISP Mandamus Order*, characterized the ISP-bound traffic being addressed, without qualification or exception, as "interstate, interexchange" in nature. The *ISP Mandamus Order* does not state or imply that its scope is limited to "local" ISP-bound calls, *i.e.*, calls where the ISP's own facilities are located in the same calling area as the originating end user. There is no reason, therefore, to

³ High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Lifeline 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).

⁴ *See, e.g., ISP Remand Order* at ¶ 10.

conclude that the rulings regarding intercarrier compensation articulated in the *ISP Mandamus Order* as limited to “local” ISP-bound traffic. To the contrary, after discussing the issue of ISP-bound traffic in previous orders the context of references to “local” calls, the FCC’s decision to avoid use of that term in its final ruling on the subject clearly shows that no such limitation was intended.⁵ The *ISP Mandamus Order* thus establishes that *all* ISP-bound traffic – including VNXX traffic – is covered by Section 251(b)(5), and, thus, the FCC-set rate of \$0.0007.⁶

B. If VNXX ISP-Bound Traffic Is Not Covered By Section 251(b)(5), Then The Commission Lacks Jurisdiction To Set An Intercarrier Compensation Rate For Such Traffic.

This case entails interpreting the terms of the parties’ former interconnection agreement. That agreement called for the payment of the “FCC ordered rate” (\$0.0007/minute) for (1) “all EAS/Local (§ 251(b)(5))” traffic and (2) “ISP-bound traffic (as that term is used in the [*ISP Remand Order*]).” See Order No. 68855 at ¶ 22. The federal district court ruled that VNXX ISP-bound traffic does not fall into the second category, *i.e.*, while it is certainly “ISP-bound traffic,” it is not embraced within the FCC’s use of that term in the 2001 *ISP Remand Order*.

As discussed above, VNXX ISP-bound traffic constitutes “Section 251(b)(5)” traffic and, therefore, falls into the first category. If the Commission disagrees with this conclusion, however, the result is not that the Commission may determine intercarrier compensation for this traffic, untethered from the terms of the parties’ ICA. To the contrary, if VNXX ISP-bound traffic does not fall under either phrase of the relevant portion of the parties’ ICA, then the

⁵ The Ninth Circuit has recently explained that, when construing FCC orders regarding intercarrier compensation obligations, it is appropriate to apply the canon of construction that “the use of ‘different words in connection with the same subject’ signifies that the drafter intended to convey different meanings by its disparate word choice.” *AT&T Communications of California, Inc. v. Pac-West Telecomm, Inc.*, 651 F.3d 980, 992 (9th Cir. 2011) (citations and footnote omitted).

⁶ As explained in Level 3’s 2010 briefing, the rule established in the *ISP Mandamus Order* applies to the resolution of this case.

Commission has no legal authority to determine the intercarrier compensation applicable to VNXX ISP-bound traffic as between Qwest and Level 3 at all. This is because ISP-bound traffic is jurisdictionally interstate,⁷ and the Commission has no inherent legal authority to address interstate matters that are entrusted by Congress to the FCC.⁸ The Commission only obtains authority to address interstate matters as a result of the performance of its Congressionally-delegated duties, under Section 252 of the Act, to establish, interpret, and enforce interconnection agreements.² If intercarrier compensation for VNXX ISP-bound traffic is governed by an ICA, then the Commission may interpret, apply, and enforce the ICA with respect to such traffic. But if it is not – which would be the inevitable result of holding that VNXX ISP-bound traffic is not covered by the phrase “all EAS/Local (§ 251(b)(5))” traffic in the parties’ ICA – then the Commission has no legal jurisdiction to set such compensation.

Thus, further proceedings in this case must be established with the understanding that the Commission does not have any independent authority to deal with VNXX ISP-bound traffic – all

⁷ See, e.g., *ISP Mandamus Order* at ¶¶ 2-4, 6.

⁸ It makes no difference to the jurisdictional question that the facilities used to provide an interstate service are located partly or entirely within a single state. For example, a LEC such as Qwest may provide a discrete interstate special access circuit linking an IXC’s point of presence in Phoenix with a large business customer in Phoenix to handle that customer’s interstate long distance calls. The Commission has no jurisdiction over the rates for such a circuit even though it is entirely intrastate as a physical matter. Jurisdiction is determined by the nature of the traffic flowing over carrier facilities, not their physical location. See, e.g., *Ivy Broadcasting Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 491 (2d Cir. 1968) (questions concerning the duties, charges and liabilities of telephone companies with respect to interstate services are to be governed exclusively by federal law); *New York Tel. Co. v. New York State Pub. Serv. Comm’n*, 631 F.2d 1059, 1066 (2d Cir. 1980); *Teleconnect Co. v. Bell Tel. Co. of Pa.*, File Nos. E-88-83, et al., *Memorandum Opinion and Order*, 10 FCC Rcd. 1626 (1995); *Bill Correctors, Inc. v. Pacific Bell*, File No. E-92-100, *Memorandum Opinion and Order*, 10 FCC Rcd. 2305 (1995); *AT&T Corp. v. Bell Atlantic – Pennsylvania, Inc.*, File Nos. E-95-007, et al., *Memorandum Opinion and Order*, 14 FCC Rcd. 556 (1998).

² See, e.g., *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378-79 (1999); *Smith v. Illinois Bell*, 282 U.S. 133, 148-49 (1930); *Pacific Bell v. Pac-West*, 325 F.3d 1114, 1126 n.10 (9th Cir., 2003).

of which is jurisdictionally interstate in nature.¹⁰ Its power to act arises entirely from its authority to interpret and enforce the parties' interconnection agreement. The Commission can rule that VNXX ISP-bound traffic falls within the portions of that agreement dealing with "EAS/local (§ 251(b)(5))" traffic. But if the Commission does not read the agreement that way, then there is no remaining jurisdictional "hook" – in the parties' agreement or otherwise – that would permit the Commission to establish an intercarrier compensation rate for this "non-local" ISP-bound traffic.¹¹

C. Even If The *ISP Mandamus Order* Does Not Literally Control The Question of Intercarrier Compensation for VNXX ISP-Bound Traffic, The Most Logical Application Of That Ruling Leads To The Conclusion That Such Traffic Is Subject To Reciprocal Compensation Under Section 251(b)(5).

As discussed above, the only way this Commission can obtain jurisdiction to determine intercarrier compensation for VNXX ISP-bound traffic is by ruling that such traffic constitutes "EAS/local (§ 251(b)(5))" traffic. This would be an entirely reasonable ruling for the Commission to make, even if the *ISP Mandamus Order* is not viewed as directly establishing that conclusion.

As explained in Level 3's earlier briefing, some courts (notably the First Circuit) have held that: (a) the compensation scheme in the original *ISP Remand Order* was limited to calls in which the ISP's equipment is in the same calling area as the end user dialing the ISP; (b) the

¹⁰ See, e.g., *ISP Mandamus Order* at ¶¶2-4, 6; *Core Communications v. FCC*, 592 F.3d 139, 143-44 (D.C. Cir. 2010) (even traffic where the ISP is "local" to the calling party is interstate in nature; state authority over rates for such traffic arises from the Section 251/252 process).

¹¹ See *Level 3 Communications v. Public Utility Commission of Oregon*, 2011 U.S. Dist. LEXIS 151936 (D. Ore. 2011). That case arose from a decision by the Public Utility Commission of Oregon, in an arbitration proceeding, that that commission "did not have authority to set any rate, even a zero rate, on the VNXX-routed ISP-bound traffic because the traffic crossed state boundaries, was interstate in nature, and therefore was subject to FCC jurisdiction." 2011 U.S. Dist. LEXIS 151963, at [*11]. The court affirmed the Oregon Commission's ruling. *Id.* at [*55] – [*56].

purpose of the *ISP Mandamus Order* was simply to provide a legal justification for that compensation scheme; and, therefore (c) the *ISP Mandamus Order* does not mean that the FCC has already determined as a matter of law that VNXX ISP-bound traffic is subject to reciprocal compensation under Section 251(b)(5). From this perspective, the *ISP Mandamus Order* is not binding precedent; it is simply one factor to consider in determining the regulatory classification of VNXX ISP-bound calls.¹²

Under this view, the Commission should rule that VNXX ISP-bound calls should be treated as subject to Section 251(b)(5) because that is the most logical answer in light of what the *ISP Mandamus Order* says about how the statute works, even if that order is not viewed as already having resolved the question. Specifically, the *ISP Mandamus Order* confirms that by its own terms, Section 251(b)(5) applies to all telecommunications – including “interstate, interexchange” ISP-bound calls¹³ – with the only limitation on its reach being the “grandfather” provision of Section 251(g). From this perspective, then, the proper treatment of VNXX ISP-bound traffic depends on whether VNXX arrangements constitute some form of “exchange access, information access, or exchange services for such access” being provided by the ILEC (here Qwest). If so, then Section 251(b)(5) does not apply; if not, then it does. *See* 47 U.S.C. § 251(g).

Two recent federal district court cases confirm that Section 251(g) does not “preserve” the application of access charges to service arrangements that did not exist prior to the passage of the 1996 Act.¹⁴ Moreover, the FCC has also recently confirmed the D.C. Circuit’s statement in

¹² *Id.*

¹³ *ISP Mandamus Order* at ¶ 6.

¹⁴ *See Sprint Communications Co. v. Native American Telecom, LLC*, 2012 U.S. Dist. LEXIS 22205 (D.S.D. 2012) at [*24] – [*25] (noting precedent holding that, since Voice-over-Internet-Protocol (note continued)...

*WorldCom v. FCC*¹⁵ that Section 251(g) *only* grandfathers compensation arrangements that existed before 1996 between an ILEC on the one hand, and either an interexchange carrier (“IXC”) or an information service provider on the other. Section 251(g) has no application at all to LEC-to-LEC compensation arrangements for any kind of traffic, because LEC-to-LEC compensation arrangements did not exist prior to the passage of the 1996 Act.¹⁶ In the case at hand, this limitation on the reach of Section 251(g) is dispositive because, from the very beginning of this case, Qwest has *denied* that Level 3 is, or is acting as, an IXC.¹⁷

Even if the FCC, in the *ISP Mandamus Order*, did not literally rule that VNXX ISP-bound traffic is subject to Section 251(b)(5), that agency is certainly aware that the legal logic of that order strongly suggests that result. In February 2011, the FCC issued its *USF/ICC*

... (note continued)

(“VoIP”) arrangements did not exist before the 1996 Act was passed, access charges cannot apply to such arrangements notwithstanding Section 251(g)); *Northern Valley Communications, LLC v. Sprint Communications Co.*, 2012 U.S. Dist. LEXIS 40082 (D.S.D. 2012) at [*24] – [*25] (same). Level 3 has no view as to whether the particular VoIP arrangements in those cases did or did not reflect some new service arrangement that did not exist previously; the point here is simply that, where an arrangement did not exist previously – and VNXX arrangements are surely new – Section 251(g) does not act to “preserve” the application of access charges.

¹⁵ *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

¹⁶ See Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up, Second Order on Reconsideration, FCC 12-47 (released Apr. 25, 2012) at ¶ 38 & n. 114. See also Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (“*USF/ICC Transformation Order*”) (2011) at ¶ 958. In both of these decisions, the FCC recognizes that Section 251(g) has no application to LEC-to-LEC compensation arrangements.

¹⁷ In its very first brief in this case, back in 2005, Qwest stated that “no IXC is involved” in the handling of VNXX traffic. See Qwest Opening Brief, Docket Nos. T-01051B-05-0415 *et al.* (filed Nov. 30, 2005). See also Order No. 68855 at 12, ¶ 53 (noting that Qwest states that “there is no [IXC] involved” with VNXX traffic”). Qwest made this argument in order to support its claim that nothing in the parties’ interconnection agreement governed VNXX arrangements.

Transformation NPRM,¹⁸ proposing a number of fundamental reforms in the realm of intercarrier compensation. In that NPRM, the FCC asks “whether [FCC] attention is still required” with respect to VNXX traffic; its specific questions included whether the *ISP Mandamus Order* “moots any of the underlying issues.”¹⁹ Again, while the *ISP Mandamus Order* does not, by its literal terms, address VNXX arrangements, the only way that that order could “moot” the need for an FCC ruling on that point would be if – as explained above – the best way to read the legal and policy logic contained in the *ISP Mandamus Order* is to see that it does, indeed, fully apply to VNXX arrangements.²⁰

D. A Ruling That VNXX ISP-Bound Traffic Is Not Covered By Section 251(b)(5) Would Raise A Host Of Complex Legal And Factual Questions.

As explained above, if VNXX ISP-bound traffic is not subject to Section 251(b)(5), this Commission lacks jurisdiction to address compensation for this traffic at all. Putting aside the jurisdictional bar, however, moving forward with this proceeding in the face of a conclusion that Section 251(b)(5) does not control would create serious factual and legal complexities.

Qwest has argued in the past that the appropriate intercarrier compensation applicable in such situations is the originating intrastate access charges of the LEC serving the calling party. Recent legal and developments, however, make clear that this conclusion cannot be assumed to

¹⁸ Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554 (2011) (“*USF/ICC Transformation NPRM*”).

¹⁹ *Id.* at ¶ 687 n. 1106 (specifically citing ¶¶ 6-29 of the *ISP Mandamus Order*).

²⁰ In this regard, even when a matter is pending before the FCC, if the question is within a state commission’s authority to resolve as part of the establishment, interpretation, or enforcement of an ICA, then the state commission should address and resolve it. See Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas, 24 FCC Rcd 12573 (2009) (“*UTEX Preemption Ruling*”) at ¶ 10.

be true. Specifically, recent case law shows that the question of whether a LEC's access charges apply is not as simple as looking at the originating and termination points of the call, and applying access charges to any "interexchange" traffic. To the contrary, the specific terms of the LEC's tariff must be examined to determine if, in fact, those terms apply to the specific factual situation at hand.²¹ So, if the Commission holds that Section 251(b)(5) does not apply to VNXX ISP-bound calls, and yet still concludes it has jurisdiction to act, that holding would open the question of whether Qwest's access charges might possibly apply to such traffic. To determine whether access charges *actually* apply would require a detailed review of the terms of Qwest's access tariffs, combined with a detailed review of the specific physical services that Qwest was providing to Level 3, to see if the two match.²²

There is yet another layer of complexity if the Commission chooses not to apply Section 251(b)(5) to VNXX ISP-bound calls. If the Commission determines that, with respect to VNXX

²¹ See, e.g., *AT&T Corp. v. YMAX Communications*, Memorandum Opinion and Order, 26 FCC Rcd 5742 (2011) at ¶¶ 12-47 (physical services actually provided by LEC to IXC do not correspond to tariff description, so tariff charges cannot be applied); *Qwest Communications Company, LLC v. Northern Valley Communications, LLC*, Memorandum Opinion and Order, 26 FCC Rcd 8332 (2011), *passim* (tariff did not require that end user receiving traffic be a paying customer of LEC purporting to assess access charges; unlawful tariff meant that no charges could be assessed). There was no dispute in either of these cases that the calls for which the LEC was attempting to impose access charges on the IXC were literally "interexchange" in nature, in the sense that the calls started and ended in different calling zones (in those cases, different states). That fact, however, established only that the LEC's access charges *might* apply. Whether such access charges *actually did* apply could only be determined after a careful review of the applicable tariff language and detailed factual findings regarding the specific physical services the LEC was providing.

²² Avoiding these kinds of complications is one reason that some states have determined that the most practical solution to call classification is to use the NPA-NXX codes of the calling and called number – rather than any effort to determine parties' actual physical locations. In this regard, any claim that there is some industry standard assumption that a telephone number corresponds to a particular location is utterly outdated. As the FCC has observed, as of the end of 2010, there were approximately 300,000,000 wireless devices in service, as compared to only 117,000,000 fixed lines. *USF/ICC Transformation Order, supra*, 26 FCC Rcd 17633 at ¶ 748. In other words, the overwhelming majority of telephone numbers today – and for many years – have been assigned to services where the number provides no reliable indicator of the calling or called party's physical location. The disjunction between a VNXX number and the called party's physical location, therefore, is not some aberration – it is entirely the norm for the modern PSTN.

ISP-bound traffic, Level 3 is acting in some measure and to some extent as an IXC, that does not mean that Level 3 is not at the same time acting, in some measure and to some extent, as a LEC. From this perspective – and contrary to Qwest’s argument at the outset of this proceeding²³ – it may well be that arrangements applicable to “jointly provided access” apply. Moreover, to the extent that Level 3 is providing interstate access to “its” IXC operations by means of providing local telephone numbers that end users may dial to make long distance calls, the most analogous form of switched access being provided would appear to be “Feature Group A” access. In that case, the governing rule is not that both LECs should bill the IXC (as is the case with more common “Feature Group D” access). Instead, the rule is that the two LECs involved in originating a Feature Group A call that connects to an IXC are to negotiate in good faith to establish some arrangement for sharing some portion of whatever revenues the LEC that directly serves the IXC may obtain from the IXC.²⁴ Thus, even if Level 3 is found to be (in part) an IXC in connection with its provision of VNXX arrangements, the net result of such a finding would appear to be simply that Level 3 and Qwest should negotiate some equitable result, rather than the Commission deciding anything at all about intercarrier compensation.

For all these reasons, a Commission decision that Section 251(b)(5) does *not* govern intercarrier compensation for VNXX ISP-bound calls would create the need for extensive factual, technical discovery; it would create the need to carefully parse Qwest’s access tariffs to determine whether they apply to the physical services that Qwest actually provides in a VNXX arrangement; and it could well mean that the Commission itself cannot determine intercarrier

²³ See note 17 and accompanying text, *supra*.

²⁴ See *Access Billing Requirements for Joint Service Provision*, Memorandum Opinion and Order, 4 FCC Rcd 7183 (Common Carr. Bur. 1989) ¶¶ 22-23. See also *Bell Atlantic Delaware, Inc. v. Global NAPs, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 12946 (1999) at ¶ 14 & n.48 (suggesting that Feature Group A rules apply to the situation of two LECs providing PSTN connectivity to an ISP)

compensation anyway, because governing law calls for such compensation to be negotiated. Level 3 submits that it is entirely reasonable for this Commission to take all of these complexities into account when determining how it will treat VNXX ISP-bound calls for purposes of intercarrier compensation,²⁵ and that, when it does so, the only reasonable approach is to treat VNXX ISP-bound calls as subject to Section 251(b)(5).

III. CONCLUSION.

Level 3 continues to assert that the FCC's *ISP Mandamus Order* has the effect, on its own terms, of bringing all VNXX ISP-bound traffic within the ambit of Section 251(b)(5). But even if it does not have that effect literally and of its own force, that is the only conclusion that can logically be squared with the reasoning contained in that order. The only traffic that is *not* subject to Section 251(b)(5) is (as addressed by Section 251(g)) exchange access or information access traffic being exchanged between a LEC and an IXC or an information service provider; neither applies to VNXX ISP-bound traffic.

In the absence of a conclusion that VNXX ISP-bound traffic is subject to Section 251(b)(5), the Commission lacks jurisdiction to resolve any questions regarding intercarrier compensation for this traffic, because the traffic is unquestionably interstate in nature. If it is subject to Section 251(b)(5), then the Commission has jurisdiction with respect to it as result of the terms of the parties' ICA, but if it is not, then the ICA does not apply and the Commission's jurisdiction dissolves.

Moreover, enormous regulatory and factual complexities would arise – and would have to be addressed in this proceeding – if Section 251(b)(5) were deemed *not* to apply. The

²⁵ See, e.g. *USF/ICC Transformation Order*, *supra*, 26 FCC Rcd 17633 at ¶ 753 (the regulatory costs and complexities of pursuing a particular regulatory approach may reasonably be considered in rejecting that approach in favor of one that does not raise such costs and complexities).

Commission, therefore, should rule that this traffic is indeed subject to reciprocal compensation, at a rate of \$0.0007/minute.

RESPECTFULLY SUBMITTED this 4th day of June, 2012.

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