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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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Commissioner
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Commissioner
PAUL NEWMAN
Commissioner
BRENDA BURNS
Commissioner

PAC-WEST TELECOMM, INC.
Complainant,

v.

QWEST CORPORATION,
Respondent.

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

LEVEL 3 COMMUNICATIONS, LLC,
Complainant,

v.

QWEST CORPORATION,
Respondent.

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

SUPPLEMENTAL AUTHORITY AND ARGUMENT OF CENTURYLINK

Qwest Corporation d/b/a CenturyLink QC ("CenturyLink") submits this supplemental authority and argument pursuant to the procedural orders issued on March 20, 2012 and May 14, 2012 by the Arizona Corporation Commission (the "Commission").

INTRODUCTION

This proceeding is a remand from the Arizona Federal Court's March 6, 2008 decision in *Qwest Corporation v. Arizona Corporation Commission*, Case No. CV-06-2130-PHX-SRB (Az Dist. Ct. March 6, 2008). In the initial complaint proceedings before the Commission, the Commission had determined that Qwest Corporation was required to pay Level 3

1 Communications, LLC (“Level 3”) and Pac-West Telecomm, Inc. (“Pac-West”) reciprocal
2 compensation under their respective amended interconnection agreements (“ICAs”) with Qwest
3 for all Internet Service Provider (“ISP”) traffic that Level 3 and Pac-West terminated, including
4 VNXX traffic, at the rate prescribed in the FCC’s *ISP Remand Order*¹ of \$.0007 per minute of
5 use. Qwest appealed the Commission’s determinations to federal court, and after considering the
6 arguments of the parties, the Arizona Federal Court enjoined enforcement of the key aspects of
7 the Commission’s determinations and remanded this matter back to the Commission.

8 In its order, the Arizona Federal Court found that the Level 3 and Pac-West ICA
9 Amendments used the term “ISP-bound traffic” in the same way that this term was used in the
10 *ISP Remand Order*. After carefully analyzing the *ISP Remand Order*, the history of FCC
11 decisions preceding it and the subsequent court decisions interpreting it, the Court concluded that
12 ISP-bound traffic included only calls to an ISP located in the caller’s local calling area and did
13 not include VNXX traffic. The Court concluded that the Commission violated federal law by
14 failing to properly interpret the *ISP Remand Order*, which was fundamental to the interpretation
15 of the Level 3 and Pac-West ISP Amendments. Ultimately, the Court remanded the matter back
16 to the Commission to determine whether VNXX traffic was local traffic subject to reciprocal
17 compensation, interexchange traffic subject to access charges, or traffic subject to some other
18 form of intercarrier compensation.

19 On November 5, 2008, the FCC released its *ISP Mandamus Order*.² In the *ISP*
20 *Mandamus Order*, the FCC responded to the D.C. Circuit Court’s remand in *WorldCom v. FCC*³
21 directing the FCC to provide a sufficient legal rationale for the rules adopted in the *ISP Remand*
22 *Order* for local ISP calls. The *ISP Mandamus Order* does not purport to expand the scope of
23

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

26 ² Order on Remand, *In the Matter High-Cost Universal Service Support*, 24 FCC Rcd 6475 (Rel.
November 5, 2008)(“*ISP Mandamus Order*”).

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

1 traffic addressed in the *ISP Remand Order* and *WorldCom*⁴ to include VNXX calls.
2 Nevertheless, in their briefs concerning the procedural schedule in this matter, Level 3 and Pac-
3 West claimed that the FCC determined in the *ISP Mandamus Order* that VNXX ISP calls are
4 subject to reciprocal compensation. The Parties filed initial briefs on October 1, 2010 and reply
5 briefs on November 12, 2010.

6 Subsequent to the briefing in 2010, there have been three significant decisions pertinent
7 to this case and all three reject the arguments made by Level 3 and Pac-West here. First, on
8 January 13, 2012, in *Level 3 Communications, LLC v. Public Utilities Commission of Oregon*
9 (the "*Oregon Level 3 Decision*"),⁵ the United States District Court for the District of Oregon,
10 held that the *ISP Mandamus Order* did not expand the scope of traffic addressed in the *ISP*
11 *Remand Order* and that VNXX traffic is not subject to reciprocal compensation under
12 Section 251(b)(5) of the Act. Second, in *Pac-West Telecomm, Inc. v. Qwest Corporation*,⁶ the
13 Washington Commission similarly ruled that VNXX traffic is not subject to reciprocal
14 compensation and found instead that VNXX traffic is interexchange traffic that falls within
15 Section 251(g) of the Act. Third, in its *USF/ICC Transformation Order* released on November
16 18, 2011,⁷ the FCC determined that its ESP Exemption rule is one of the intercarrier

17 ⁴ In the *ISP Remand Order*, the FCC stated that the question at issue was "whether reciprocal
18 compensation obligations apply to the delivery of calls from one LEC's end user customer to an
19 ISP in the same local calling area that is served by a competing LEC." *ISP Remand Order*, ¶13.
20 In *WorldCom*, the DC Circuit confirmed that the calls it was addressing consisted of "calls made
to internet service providers ('ISPs') located within the caller's local calling area." *WorldCom*,
288 F.3d at 430.

21 ⁵ 2012 U.S. Dist. LEXIS 6729 (January 13, 2012), adopting Magistrate's Recommendation
reported as 2011 U.S. Dist. LEXIS 151936 (October 27, 2011)(Copies of the Magistrate's
22 Recommended decision and the Court's Order adopting the Magistrate's Recommendation are
attached as Exhibit A).

23 ⁶ Order 12, Final Order, *Pac-West Telecomm, Inc. v. Qwest Corporation*, Docket Nos. UT-53036
and UT-053039, 2011 Wash. UTC LEXIS 854 (November 14, 2011)("Washington Order
12")(Copies of the Final Order and Order denying Reconsideration are attached as Exhibit B).

24 ⁷ Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of 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 an
Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service;
Lifeline and Link-Up; Universal Service Reform – Mobility Fund, 26 FCC Rcd. 17663, ¶¶956-
25 958 (Rel., November 18, 2011)(the "*USF/ICC Transformation Order*")(A copy of the *USF/ICC*
26

1 compensation rules that is preserved by Section 251(g) of the Act, as Qwest argued in its prior
2 briefs.

3 SUPPLEMENTAL AUTHORITY AND ARGUMENT

4 **The Oregon Level 3 Decision**

5 In the *Oregon Level 3 Decision*, the Oregon Federal Court held that VNXX ISP traffic is
6 not subject to the reciprocal compensation requirements of Section 251(b)(5) of the Act. In that
7 case, Level 3 had appealed a 2007 interconnection arbitration decision made by the Public Utility
8 Commission of Oregon that had denied Level 3's request for reciprocal compensation on VNXX
9 traffic. Level 3 argued, as it does here, that the Oregon Commission's decision had to be
10 reviewed based on the law at the time of the appeal (2010-2011) and that the *ISP Mandamus*
11 *Order* was the governing law. Level 3 argued to the Court that the *ISP Mandamus Order*
12 required Qwest to pay reciprocal compensation on all ISP traffic, including VNXX traffic.

13 In the *Oregon Level 3 Decision*, the Oregon Federal Court rejected Level 3's arguments.
14 The Court determined that the Oregon Commission had correctly found that the *ISP Remand*
15 *Order*, which was in effect at the time of the arbitration, did not impose reciprocal compensation
16 on VNXX traffic and that the *ISP Mandamus Order* did not change that.⁸ The Court noted that
17 the *ISP Mandamus Order* was rendered in response to the D.C. Circuit's writ of mandamus
18 directing the FCC to explain the basis for its ISP-bound compensation rules which, at the time,
19 were clearly limited to calls originating and terminating in the same local calling area.⁹ The
20 Court observed that the FCC did not indicate in the *ISP Mandamus Order* that it was expanding
21 its reciprocal compensation rules to include other types of traffic. And the Court further
22 explained that the fact that Section 251(b)(5) is not, standing alone, limited to local traffic did
23 nothing to expand the scope of the *ISP Mandamus Order*. The rule that Section 251(b)(5) covers

24
25 *Transformation Order* can be obtained at http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-11-161A1.pdf.

26 ⁸ *Oregon Level 3 Decision*, at *52.

⁹ *Id.*, at *51-*52.

1 traffic that is not encompassed by Section 251(g) of the Act had already been articulated in the
2 *ISP Remand Order* and the *ISP Mandamus Order* merely reaffirmed that conclusion.¹⁰

3
4 The Oregon Federal Court reviewed the FCC decisions and case law both before and
5 after the *ISP Mandamus Order* in reaching its decision. The Court stated:

6 In light of the history behind the *Mandamus Order*, the narrow view of the ISP-bound
7 traffic considered in, and covered by, the previous FCC orders, by both the FCC and the
8 courts, and the absence of any expression of intent by the FCC to expand the coverage of
9 the *Mandamus Order* to include VNXX-routed ISP-bound traffic, the court finds that the
10 *Mandamus Order* does not impose reciprocal compensation requirements on VNXX-
11 routed ISP-bound traffic. Decisions from the First, Ninth, and DC Circuits support this
12 conclusion.¹¹

13 Accordingly, the Court concluded that VNXX ISP traffic “is not covered by the *Remand Order*
14 or the *Mandamus Order*, and is not subject to reciprocal compensation provisions of §251(b)(5)
15 or the compensation regime established by the FCC for local, non-VNXX ISP-bound traffic.”¹²

16 In reaching its decision, the Oregon Federal Court considered the Ninth Circuit’s recent
17 2011 decision in *AT&T Communications of California v. Pac-West Telecomm.*¹³ In *AT&T*, the
18 Ninth Circuit was addressing the applicability of the FCC’s *ISP Remand Order* to local ISP-
19 bound traffic exchanged between two CLECs.¹⁴ In its analysis of that issue, the Ninth Circuit
20 reviewed the applicable law and reaffirmed that in *Verizon California v. Peevey*,¹⁵ it had held
21 that the *ISP Remand Order* does not apply to “interexchange (that is, non-local) ISP-bound
22 traffic.”¹⁶ The Ninth Circuit also cited with approval the series of *Global Naps* decisions
23 rendered by the 1st and 2nd Circuit Courts of Appeal that CenturyLink cited in its briefs for the
24 proposition that originating access charges, not reciprocal compensation, apply to VNXX traffic.
25 In particular, the Ninth Circuit cited with approval *Global Naps V*,¹⁷ which upheld the

23 ¹⁰ *Id.*, at *53.

24 ¹¹ *Id.*, at *52-*53.

25 ¹² *Id.*, at *55.

26 ¹³ 651 F.3d 980 (9th Cir. 2011)(“*AT&T*”).

¹⁴ *Id.*, at 981.

¹⁵ 462 F.3d 1142, 1159 (9th Cir. 2006).

¹⁶ *AT&T*, 651 F.3d at 981.

¹⁷ *Global Naps v. Verizon New England*, 603 F.3d 71 (1st Cir. 2010)(“*Global Naps V*”).

1 applicability of access charges on VNXX traffic and which was issued after the *ISP Mandamus*
2 *Order*. AT&T thus confirms that *Global Naps V* is consistent with the law in the Ninth Circuit.

3 **The Washington Commission Decision**

4 This remand proceeding is one of two remand proceedings that are being litigated
5 concerning whether reciprocal compensation is due on VNXX traffic. The other is a remand
6 from the Washington Federal Court's decision in *Qwest Corporation v. Washington State*
7 *Utilities and Transportation Commission*.¹⁸ In *Qwest*, the Washington Federal Court held that
8 the *ISP Remand Order* did not require reciprocal compensation be paid on non-local traffic and
9 remanded the case back to the Washington Commission to classify VNXX traffic "for
10 compensation purposes, as within or outside a local calling area."¹⁹ The Washington
11 Commission issued its initial decision on the remand on November 14, 2011 and in that decision,
12 it found that VNXX traffic is interexchange traffic, not local traffic, and that it is not subject to
13 reciprocal compensation under Section 251(b)(5) of the Act.²⁰ The Washington Commission
14 denied Level 3 and Pac-West petitions for reconsideration on February 10, 2012.²¹

15 In the Washington remand proceeding, Level 3 and Pac-West made the same arguments
16 that they make here that the *ISP Mandamus Order* requires the payment of reciprocal
17 compensation on VNXX traffic. The Washington Commission rejected their arguments and
18 made the following three determinations that are pertinent here. First, the Commission
19 determined that "neither the *Mandamus Order* nor the *Core III* decision upholding it change the
20 relatively narrow scope of traffic addressed by the *ISP Remand* –the 'subset of ISP-bound traffic,
21 specifically, [dial up] ISP-bound traffic within a local calling area."²² The Commission
22 determined that "the *Mandamus Order* only clarified the legal rationale supporting the *ISP*

23 ¹⁸ 484 F.Supp.2d 1160 (W.D. Wash 2007)(*"Qwest"*).

24 ¹⁹ *Id.* at 1177.

25 ²⁰ *Washington Order 12*, ¶90.

26 ²¹ Order 13, Order Denying Petition for Reconsideration, *Pac-West Telecom, Inc. v. Qwest Corporation*, Docket Nos. UT-053036 and UT 53039, 2012 Wash. UTC LEXIS 129 (February 10, 2012)(A copy of Order 13 is attached in Exhibit B).

²² *Washington Order 12*, ¶53.

1 *Remand Order*'s compensation scheme...It did not create a new regulatory scheme by expanding
2 the scope of traffic to which the FCC's rates established in the *ISP Remand Order* apply."²³
3 Second, the Washington Commission reaffirmed its prior determination that VNXX traffic is not
4 local traffic under Washington law.²⁴ In Washington, like Arizona, local calling areas are
5 geographically defined and VNXX traffic is interexchange traffic because it involves calls that
6 are originated in one local calling area and delivered to an ISP (or terminated) in a different local
7 calling area. Finally, the Washington Commission held that VNXX traffic falls within
8 Section 251(g) of the Act and is therefore not subject to reciprocal compensation under
9 Section 251(b)(5) of the Act.²⁵

10 The Washington Commission's determination that local calling areas are geographically
11 defined in Washington is consistent with the prior decisions of the Arizona Commission on this
12 point. In two prior proceedings, the Commission has declined requests to define calls to be local
13 calls based on the telephone numbers of the calling and called parties. In Decision No. 66888,
14 involving an arbitration between AT&T Communications of the Mountain States and Qwest
15 Corporation, the Commission adopted Qwest's definition of local traffic as being "traffic that is
16 originated and terminated within the same local calling area as determined for Qwest by the
17 Commission."²⁶ The Commission reasoned that AT&T's definition, which determined whether
18 calls were local based solely on a comparison of calling and called telephone numbers, would
19 represent a "departure from the establishment of local calling areas" in Arizona.²⁷ The
20 Commission reaffirmed this determination in Decision No. 68817 in the arbitration between
21

22 ²³ *Washington Order 12*, ¶57.

23 ²⁴ *Washington Order 12*, ¶¶34, 60, 73 & 77.

24 ²⁵ *Washington Order 12*, ¶¶33, 34, 90 & 136.

25 ²⁶ Decision No. 66888, *In the Matter of the Petition of AT&T Communications of the Mountain*
States, Inc. and TCG Phoenix for Arbitration with Qwest Corporation, Inc. Pursuant to 47
U.S.C. Section 252(b), Docket Nos. T-02428A-03-0553 and T-01051B-03-0553, p. 13 (ACC,
26 April 6, 2004).

²⁷ *Id.*

1 Level 3 and Qwest in 2006.²⁸

2 **FCC's USF/ICC Transformation Order**

3 In its initial briefs, CenturyLink argued that the FCC's ESP Exemption was one of the
4 intercarrier compensation rules preserved by Section 251(g) of the Act that is applicable to
5 VNXX traffic. Under the ESP Exemption, an ISP is treated as an end user for purposes of
6 applying access charges.²⁹ Thus, because VNXX traffic is a type of traffic governed by rules
7 such as the ESP Exemption that pre-date the Act, it falls within Section 251(g) of the Act, not
8 Section 251(b)(5) of the Act.³⁰

9 On November 18, 2011, the FCC released its *USF/ICC Transformation Order* in which it
10 began the process of reforming the existing access charge regimes. In that order, the FCC
11 addressed arguments made by certain parties "that VoIP-PSTN traffic did not exist prior to the
12 1996 Act" and thus could not "be part of the access charge regimes 'grandfathered' by
13 section 251(g)."³¹ In rejecting these arguments, the FCC stated the following:

14 We reject the claims of some commenters that VoIP-PSTN traffic did not exist prior to
15 the 1996 Act, and thus cannot be part of the access charge regimes 'grandfathered' by
16 section 251(g). This argument flows from the mistaken interpretation of section 251(g).
17 The essential question under section 251(g) is not whether a particular service, or traffic
18 involving a particular transmission protocol, existed prior to the 1996 Act. Rather, the
19 question is whether there was a "pre-Act obligation relating to intercarrier compensation
20 for" particular traffic exchanged between a LEC and "interexchange carriers and
21 information service providers."³²

19 The FCC concluded that "there are pre-1996 Act obligations regarding LECs' compensation for
20 the provision of exchange access to an IXC or information service provider." In particular, the
21 FCC noted that under its ESP exemption, ESPs compensated LECs for the provision of exchange

22 _____
23 ²⁸ Decision No. 68817, *In the Matter of the Petition of Level 3 Communications LLC for*
24 *Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to Section 252(b)*
25 *of the Telecommunications Act of 1996*, Docket Nos. T-03654A-05-0350 and T-01051B-05-
26 0350, p. 28 (ACC, June 29, 2006).

²⁹ See eg. *ISP Remand Order*, ¶11.

³⁰ *ISP Mandamus Order*, ¶16.

³¹ *USF/ICC Transformation Order*, at ¶956.

³² *Id.*

1 access and that the FCC “has always recognized that information-service providers providing
2 interexchange services were obtaining exchange access from the LECs.”³³ Accordingly, the
3 FCC concluded that “because they were subject to these exchange access charges, interexchange
4 information service traffic was subject to the over-arching Commission rules governing
5 exchange access prior to the 1996 Act, and therefore subject to the grandfathering provision of
6 section 251(g).”³⁴

7 In the *USF/ICC Transformation Order*, the FCC also distinguished the D.C. Circuit’s
8 *WorldCom* decision by noting that in the fact pattern before it, the CLEC was providing local
9 service to the ISP because the traffic at issue was not interexchange traffic. In *WorldCom* the
10 traffic involved “calls made to internet service providers (“ISPs”) located within the caller’s
11 local calling area.”³⁵ The FCC observed that in that instance “the fact that the carrier serving the
12 ISP was acting as a LEC—rather than an interexchange carrier or information service provider—
13 would be dispositive that compensation for that traffic exchange could not be encompassed by
14 section 251(g).”³⁶ Thus, whether Section 251(g) encompassed VoIP-PSTN traffic turned on
15 whether the VoIP-PSTN traffic was interexchange traffic.

16 The *USF/ICC Transformation Order* supports CenturyLink’s position in this proceeding.
17 Level 3 and Pac-West both argue that VNXX traffic did not exist prior to the Act and therefore
18 that it cannot be encompassed by Section 251(g). The *USF/ICC Transformation Order* rejects
19 their analysis. As the FCC stated, the question is not whether the particular traffic existed before
20 the Act, the question is whether the traffic is governed by a rule that was preserved by Section
21 251(g) of the Act. In this case, there can be no dispute that under the ESP Exemption, an ISP is
22 treated as an end user for purposes of applying access charges. Where, as is the case with
23 VNXX traffic, the ISP is located in different local calling area than the caller, the call is an
24

25 ³³ *Id.*, at ¶957.

26 ³⁴ *Id.*

³⁵ *WorldCom*, 288 F.3d 429, 430 (D.C. Cir. 2002).

³⁶ *USF/ICC Transformation Order*, ¶958.

1 interexchange call subject to access charges under the pre-Act rules such as the ESP Exemption
2 that are preserved by Section 251(g) of the Act.

3 **CONCLUSION**

4 For the foregoing reasons, the Commission should enter an order finding that during the
5 time period at issue in this proceeding, CenturyLink did not owe reciprocal compensation on
6 VNXX traffic.³⁷ In its order, the Commission should direct Level 3 and Pac-West to refund the
7 payments that CenturyLink made to them for VNXX traffic, with interest.

8 RESPECTFULLY SUBMITTED this 4th day of June, 2012.

9
10 **QWEST CORPORATION dba
CENTURYLINK QC**

11 
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23 Attorneys for Qwest Corporation d/b/a CenturyLink
24 QC

25 ³⁷ CenturyLink does not owe reciprocal compensation on VNXX traffic for the additional reason
26 that Level 3 did not terminate some or all of the traffic. Attached as Exhibit C is the testimony
Level 3 witness Mack Greene gave in New Mexico in which he admitted that Level 3 often
never delivers ISP traffic to an ISP. Level 3's ISP customers often outsource all of the ISP
functions to Level 3 who routes the traffic directly onto the Internet without the traffic ever
touching the ISP's network.

1 ORIGINAL and 13 COPIES of the foregoing
2 filed this 4th day of June, 2012, with:

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EXHIBIT A



1 of 1 DOCUMENT

LEVEL 3 COMMUNICATIONS, INC., Plaintiff, v. PUBLIC UTILITY COMMISSION OF OREGON; RAY BAUM, SUSAN ACKERMAN, and JOHN SAVAGE, in their official capacities as Commissioners of the Public Utility Commission of Oregon and not as individuals; and QWEST CORPORATION, Defendants.

3:10-CV-01030-AC

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,
PORTLAND DIVISION**

2012 U.S. Dist. LEXIS 6729

**January 13, 2012, Decided
January 17, 2012, Filed**

PRIOR HISTORY: *Level 3 Communs., LLC v. PUC, 2011 U.S. Dist. LEXIS 151936 (D. Or., Oct. 26, 2011)*

COUNSEL: [*1] For Level 3 Communications, LLC, Plaintiff: Lisa F. Rackner, LEAD ATTORNEY, McDowell Rackner & Gibson PC, Portland, OR; Christopher W. Savage, PRO HAC VICE, Davis Wright Tremaine LLP, Washington, D.C.

For Public Utility Commission of Oregon, Ray Baum, in Official Capacity as Commissioner of the Public Utility Commission of Oregon and not as Individual, Susan Ackerman, in Official Capacity as Commissioner of the Public Utility Commission of Oregon and not as Individual, John Savage, in Official Capacity as Commissioner of the Public Utility Commission of Oregon and not as Individual, Defendants: Michael Todd Weirich, LEAD ATTORNEY, State of Oregon, Department of Justice, Salem, OR.

For Qwest Corporation, Defendant: Lawrence H. Reichman, LEAD ATTORNEY, Perkins Coie, LLP, Portland, OR; John Devaney, PRO HAC VICE, Perkins Coie, LLP (Washington), Washington, DC; Thomas M. Dethlefs, PRO HAC VICE, Qwest Corporation, Denver, CO.

JUDGES: ANNA J. BROWN, United States District Judge.

OPINION BY: ANNA J. BROWN

OPINION

ORDER

BROWN, Judge.

Magistrate Judge John V. Acosta issued Findings and Recommendation (#47) on October 27, 2011, in which he recommends this Court deny Plaintiff Level 3 Communications' Motion (#26) for Summary Judgment, [*2] grant Defendant Public Utility Commission of Oregon's Cross-Motion (#29) for Summary Judgment, grant Defendant Qwest Corporation's Cross-Motion (#30) for Summary Judgment, and dismiss this matter with prejudice. The matter is now before this Court pursuant to 28 U.S.C. § 636(b)(1)(B) and *Federal Rule of Civil Procedure 72(b)*.

Because no objections to the Magistrate Judge's Findings and Recommendation were timely filed, this Court is relieved of its obligation to review the record *de novo*. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003)(*en banc*). See also *United States v. Bernhardt*, 840 F.2d 1441, 1444 (9th Cir. 1988). Having reviewed the legal principles *de novo*, the Court does not find any error.

CONCLUSION

The Court **ADOPTS** Magistrate Judge Acosta's Findings and Recommendation (#47). Accordingly, the Court **DENIES** Plaintiff Level 3 Communications' Mo-

tion (#26) for Summary Judgment, **GRANTS** Defendant Public Utility Commission of Oregon's Cross-Motion (#29) for Summary Judgment, **GRANTS** Defendant Qwest Corporation's Cross-Motion (#30) for Summary Judgment, and **DISMISSES** Plaintiff's claims in their entirety.

IT IS SO ORDERED.

DATED this 13th day of January, 2012.

/s/ Anna J. Brown [*3]

ANNA J. BROWN

United States District Judge

JUDGMENT

Based on the Court's Order (#49) issued January 13, 2012, the Court **DISMISSES** Plaintiff's claims in their entirety.

IT IS SO ORDERED.

DATED this 13th day of January, 2012.

/s/ Anna J. Brown

ANNA J. BROWN

United States District Judge



1 of 1 DOCUMENT

LEVEL 3 COMMUNICATIONS, LLC, Plaintiff, v. PUBLIC UTILITY COMMISSION OF OREGON; and RAY BAUM, SUSAN ACKERMAN and JOHN SAVAGE, in their Official Capacities as Commissioners of the Public Utility Commission of Oregon and not as Individuals, and QWEST CORPORATION, Defendants.

Case No.: 3:10-CV-1030-AC

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,
PORTLAND DIVISION**

2011 U.S. Dist. LEXIS 151936

**October 26, 2011, Decided
October 27, 2011, Filed**

SUBSEQUENT HISTORY: Adopted by, Summary judgment granted by, Complaint dismissed at *Level 3 Communs., Inc. v. PUC, 2012 U.S. Dist. LEXIS 6729 (D. Or., Jan. 13, 2012)*

COUNSEL: [*1] For Level 3 Communications, LLC, Plaintiff: Lisa F. Rackner, LEAD ATTORNEY, McDowell Rackner & Gibson PC, Portland, OR; Christopher W. Savage, PRO HAC VICE, Davis Wright Tremaine LLP, Washington, D.C.

For Public Utility Commission of Oregon, Ray Baum, in Official Capacity as Commissioner of the Public Utility Commission of Oregon and not as Individual, Susan Ackerman, in Official Capacity as Commissioner of the Public Utility Commission of Oregon and not as Individual, John Savage, in Official Capacity as Commissioner of the Public Utility Commission of Oregon and not as Individual, Defendants: Michael Todd Weirich, LEAD ATTORNEY, State of Oregon, Department of Justice, Salem, OR.

For Qwest Corporation, Defendant: Lawrence H. Reichman, LEAD ATTORNEY, Perkins Coie, LLP, Portland, OR; John Devaney, PRO HAC VICE, Perkins Coie, LLP (Washington), Washington, DC; Thomas M. Dethlefs, PRO HAC VICE, Qwest Corporation, Denver, CO.

JUDGES: JOHN V. ACOSTA, United States Magistrate Judge.

OPINION BY: JOHN V. ACOSTA

OPINION

FINDINGS AND RECOMMENDATION

ACOSTA, Magistrate Judge:

Introduction

Plaintiff Level 3 Communications, LLC, ("Level 3") filed this action for review of an order issued by defendant Public Utility Commission of Oregon [*2] ("Commission")¹ on March 14, 2007, ("Order") establishing the terms of an interconnection agreement between Level 3 and defendant Qwest Corporation ("Qwest"). Level 3 argues that the Commission erred in finding that Level 3 is not entitled to reciprocal compensation for traffic to Level 3's internet service providers ("ISP" or "ISPs") and that Level 3 must pay Qwest to carry Qwest-originated traffic from Level 3's secondary points of interconnection to its primary points of interconnection. The pivotal question before the court is whether virtual local ISP-bound traffic is subject to the reciprocal compensation requirements of § 251(b)(5) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat 56 (codified as amended in scattered sections of 47 U.S.C.) (the "Act"). The court finds that it is not and recommends that the Commission's ruling be affirmed.

1 Also named as defendants in their official capacities as Commissioners of Oregon's Public Utility Commission are Ray Baum, Susan Ackerman, and John Savage ("Commissioners").

Background

Qwest provides local and long distance telephone services in a number of states, including Oregon, and qualifies as an incumbent local exchange carrier [*3] ("ILEC") in Oregon under the terms of the Act. (Compl. ¶ 14.) **Level 3** provides a variety of telecommunications services, including wholesale dial-up services to a number of ISPs located throughout North America. (Compl. ¶¶ 2, 13.) **Level 3** is considered a competitive local exchange carrier ("CLEC") under the terms of the Act. (Compl. ¶ 2 fn 3-) Both Qwest and **Level 3** have certificates issued by the Commission allowing them to provide local, long distance, and other services within the state of Oregon. (Compl. ¶¶ 13, 14.)

Telephone numbers generally consist of ten-digit numbers identified in the industry as NPA-NXX-XXXX. The first three digits -- NPA -- are the Numbering Plan Area, commonly known as the area code. The next three digits represent the exchange code. The area code and the exchange code together generally relate to a defined geographical area served by a local exchange carrier ("LEC") and are assigned to a rate center.² Telephone calls are rated as local or toll based on the rate center locations of the calling and called parties. When the area code and exchange code of both parties to a call are assigned to the same rate center, or local calling area, the call is considered [*4] local and the calling party does not incur additional charges for the call. However, any call involving different rate centers, or local calling areas, qualifies as a toll call which generally results in additional charges to the calling party. (Compl. Ex. A at 13, quoting *Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1148 (9th Cir. 2006).)

2 The last four digits identify a specific line assigned to a customer of the LEC.

Recognizing that the imposition of toll charges on a customer connecting with ISP providers, who are generally located outside of the customer's rate center, would greatly increase the cost associated with the use of dial-up ISPs, CLECs servicing ISP-bound traffic, including **Level 3**, request phone numbers from a variety of calling areas and assign local numbers to their distant, or foreign, ISPs, thereby allowing the ISP customers to call the ISP without incurring toll charges. This practice is referred to as virtual local calling or virtual NXX ("VNXX"). (Compl. Ex. A at 14-15.) The communications at issue in this action are VNXX-routed ISP-bound traffic from Qwest's customers to **Level 3**'s ISPs.

Historically, local telephone service was provided primarily by a single [*5] company within each local area holding an exclusive franchise to service a specified territory. Congress enacted the Act in an effort to disperse the existing telephone monopolies and encourage a competitive environment, thus obligating ILECs to interconnect with CLEC to provide service in a local area. 47 U.S.C. 251. If a CLEC makes an interconnection request to an ILEC, the two local carriers have a duty to negotiate the terms of an interconnection agreement that sets forth the specifics of the interconnection, unbundled network elements, and services for resale to be covered by the agreements, as well as appropriate compensation for such services. *Id.*

The Act sets out a procedural framework for these negotiations. The CLEC first must make a request for interconnection with the ILEC, which may negotiate and enter into a binding interconnection agreement with the CLEC without regard to the provisions of 47 U.S.C. § 251. 47 U.S.C. §§ 251,252(a)(1)(2007). The parties to the negotiation may, if they wish, ask a state public utilities commission "to mediate any difference arising in the course of the negotiation," 47 U.S.C. § 252(a)(2)(2007). If the parties cannot reach agreement through [*6] voluntary negotiations or mediation, either party may "petition a State commission to arbitrate any open issues." 47 U.S.C. 252(b)(1)(2007). In resolving the open issues through compulsory arbitration, a state commission must ensure that its resolution "meet[s] the requirement of section 251", and it may "impos[e] appropriate conditions" to ensure the requirements of 47 U.S.C. § 251 are met. 47 U.S.C. §§ 252(b)(4)(C), (c)(1)(2007). Once an interconnection agreement has been adopted, either by negotiation or after compulsory arbitration, it must "be submitted for approval" to the state commission, which must either approve or reject the agreement. 47 U.S.C. § 252(e)(2007).

Level 3 and Qwest attempted, but were unable, to come to terms on an interconnection agreement for services in the state of Oregon. On June 3, 2005, **Level 3** filed a petition with the Commission requesting arbitration of an interconnection agreement with Qwest pursuant to the Act. (Compl. ¶ 6.) After extensive briefing, multiple prehearing conferences, and an evidentiary hearing, Samuel J. Petrillo (the "Arbitrator") issued his decision on February 13, 2007 (the "Decision") (Compl. ¶ 6.) In the Decision, the Arbitrator [*7] identified three main issues of dispute, one of which was the proper regulatory treatment for VNXX calls from Qwest's customers to **Level 3**'s ISPs.³ (Compl. Ex. 1 App. A at 6.) **Level 3** argued that all ISP-bound traffic is subject to 47 U.S.C. § 251(b)(5), that § 251(b)(5) allows **Level 3** to establish a single point of interconnection ("POP") within each rate center or local calling area in Oregon, and that § 251

(b)(5) obligates Qwest to bear the cost of delivering calls from Qwest's customers to Level 3 through the single POI, as well as compensate Level 3 for delivery of the ISP-bound traffic to Level 3's customers. (Compl. ¶ 3.)

3 The other two issues are not relevant to Level 3's appeal of the Decision and are not addressed in this Findings and Recommendation.

The Arbitrator explained that the use of VNXX, which allows a CLEC to avoid toll charges, has created a regulatory dilemma, particularly true in the case of Level 3, which assigns the VNXX numbers to ISP customers and then seeks compensation from the ILEC for the servicing of the call from its POI to the ISP, (Compl. Ex. 1 App. A at 14-15.) The lack of toll charges, plus the one-way traffic streams generated by calls to ISPs, transfers [*8] the entire cost of transporting VNXX ISP-bound traffic to the ILEC. (Compl. Ex. 1 App. A at 15.)

Pie then recognized that Oregon, through the Commission, has banned VNXX arrangements within the state and rejected Level 3's argument that the state lacked the authority to prohibit such arrangements, explaining that the authority of state commissions to define local calling areas, and govern compensation for traffic within these areas, is well established. (Compl. Ex. 1 App. A at 16-17.) Historically, Oregon rates calls based on the physical, or geographical, location of the parties to a call. (Compl. Ex. 1 App. A at 16.) Therefore, the Commission considers VNXX calls to be "interexchange" rather than "local" in nature, as the party receiving the call is not physically located in the same calling area as the party placing the call, despite the fact that the numbers assigned to the parties are within the same calling area, a finding consistent with the Ninth Circuit's ruling in *Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1157 n.4 (9th Cir. 2006) (Peevey), which explained that "[l]ocal traffic stays within the boundaries of a local calling area" while "interexchange (or 'non-local') [*9] traffic crosses the boundaries of a local calling area and is generally subject to toll or long-distance charges paid by the calling party." (quoting *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 62-63 (1st Cir. 2006) (Global NAPs I).) (Compl. Ex. 1 App. A at 16.) The Arbitrator also rejected Level 3's arguments that the Commission's definition of VNXX is not appropriate for ISP-bound traffic, and that call rating should be based on the POI locations rather than the ISPs physical location outside the State of Oregon, again relying on *Peevey*, as well as cases from the First and Second Circuit, which establish that VNXX arrangements should be determined by focusing on the geographic location of the parties to the call. (Compl. Ex. 1 App. A at 18-19.)

The Arbitrator recommended that the Commission: 1) lift the ban on VNXX arrangements to allow Level 3 to assign VNXX numbers to its ISP customers to facilitate dial-up ISP-bound traffic; 2) require Level 3 to assume responsibility for all costs associated with transporting VNXX-routed ISP-bound traffic from both its primary and secondary POIs in Oregon to its media gateway based on Qwest's tariff rates; 3) reject Level 3's request [*10] for compensation from Qwest in the amount of .0007 per minute of use for dial-up ISP bound traffic; and 4) set a rate of zero cents per minute of use for dial-up ISP bound traffic subject to true-up based on the rate set by the Federal Communications Commission (the "FCC") for VNXX-routed ISP-bound traffic. (Compl. Ex. 1 App. A at 27-30.) The Arbitrator recommended that if the FCC fails to set a rate for VNXX-routed ISP-bound traffic, the parties should petition the FCC for resolution of the matter. (Compl. Ex. 1 App. A at 30.)

On April 14, 2007, the Commission issued the Order in which it accepted all of the Arbitrator's recommendations with regard to VNXX-routed ISP-bound traffic, with one exception. (Compl. Ex. 1.) The Commission found that it 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. (Compl. Ex. 1 at 7.) Therefore, the Commission refused to set a rate and indicated that while it expected the FCC to address the issue in the near future, it had no objection to Level 3 filing an immediate petition with the FCC on [*11] the issue of the compensation rate applicable to VNXX-routed ISP-bound traffic. (Compl. Ex. 1 at 8.)

Level 3 did not file a petition with the FCC. Rather, Level 3 filed a complaint in this court on September 1, 2010, asserting that the Commission erred in not incorporating a rate of .0007 per minute of use for dial-up ISP bound traffic in the interconnection agreement and requiring Level 3 to pay Qwest for facilities used to carry VNXX ISP-bound traffic back to Level 3's primary POI. (Compl. at 18.) Level 3, Qwest, and the Commission each move for summary judgment, and these summary judgment motions are currently before the court.

Legal Standard

Summary judgment is appropriate where the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," *FED. R. CIV. P. 56(a)* (2010). Summary judgment is not proper if material factual issues exist for trial. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the moving party shows the absence of a genuine issue of [*12] material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324. A nonmoving party cannot defeat summary judgment by relying on the allegations in the complaint, or with unsupported conjecture or conclusory statements, *Hernandez v. Spacelabs Medical, Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). Thus, summary judgment should be entered against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

The court must view the evidence in the light most favorable to the nonmoving party. *Bell v. Cameron Meadows Land Co.*, 669 F.2d 1278, 1284 (9th Cir. 1982). All reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976). Where different ultimate inferences may be drawn, summary judgment is inappropriate. *Sankovich v. Life Ins. Co. of North America*, 638 F.2d 136, 140 (9th Cir. 1981).

However, deference to the nonmoving party has limits. A party asserting that a fact cannot be [*13] true or is genuinely disputed must support the assertion with admissible evidence. *FED. R. CIV. P. 56(c)* (2010). The "mere existence of a scintilla of evidence in support of the [party's] position [is] insufficient." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Therefore, where "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (internal quotations marks omitted).

Standard of Review

The Act vests district courts with jurisdiction to determine whether an interconnection agreement meets the requirements of the Act. 47 U.S.C. §252(e)(6)(2007). The court reviews the Commission's interpretation and application of the Act *de novo*. *Peevey*, 462 F.3d at 1150. All other issues, including the Commission's factual findings, are reviewed under an arbitrary and capricious standard. *Id.* "A state commission's decision is arbitrary and capricious if the decision 'was not supported by substantial evidence' or the commission made a 'clear error of judgment.'" *Id.* at 1150 (quoting *Pacific Bell v.*

Pac-West Telecomm, Inc., 325 F.3d 1114, 1131 (9th Cir. 2003)).

Discussion

Level [*14] 3 filed this action asserting that the Commission "violated its obligation to decide arbitrated issues in accordance with governing federal telecommunications laws and policies." (Compl. ¶ 5.) Specifically, **Level 3** asserts that the Commission erred in finding that VNXX-routed ISP-bound traffic is not covered by the reciprocal compensation provisions of § 251 (b)(5) and that **Level 3** is obligated to pay access charges to Qwest for the transport of VNXX-routed ISP-bound traffic from **Level 3's** secondary POI's to its primary POI. The parties disagree on whether the FCC has determined the appropriate compensation for VNXX-routed ISP-bound traffic. However, before addressing the parties' arguments on the merits of this issue, the court first must address the question of whether it has jurisdiction over the questions presented by the complaint.

I. Jurisdiction

Qwest argues that because the Commission refused to set a rate for VNXX-routed ISP-bound traffic, **Level 3's** sole avenue of redress is to file an action before the FCC. In support of this argument, Qwest relies on § 252(e)(5), which provides that:

If a State commission fails to act to carry out its responsibility under this section in any [*15] proceeding or other matter under this section, then the [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

47 U.S.C. § 252(e)(5).

Qwest also relies on *Global NAPs, Inc. v. Fed. Commc'ns Comm'n*, 291 F.3d 832, 835, 351 U.S. App. D.C. 424 (D.C. Cir. 2002). There, the state commission originally failed to act for eight months on a request for a declaratory ruling that ISP-bound traffic is subject to reciprocal compensation under the terms of a specific interconnection agreement. The state commission then dismissed the request as moot after ruling on an identically worded interconnection agreement between different parties that ISP-bound calls were not local. Prior to the dismissal by the state commission, the plaintiff peti-

tioned the FCC for preemption under § 252(e). *Id.* The FCC denied the petition because the plaintiff's request had been dismissed by the state commission, and there was nothing left for the FCC to preempt. *Id.* at 836. The [*16] FCC also refused to consider the substantive validity of the state commission's dismissal, finding that its "statutory preemption authority did not empower the federal agency to examine the 'underlying reasoning' supplied by the [state commission] for its conclusion." *Id.* The D.C. Circuit effectively affirmed the ruling by the FCC explaining that "GNAPs' remedy lies not in FCC preemptions, but rather in judicial review of [the state commission's] order, whether in federal or in state court." *Id.* at 834.

Here, the Commission did not "fail to act" but approved the interconnection agreement. Nothing remains before the Commission for the FCC to preempt. The Commission's failure to set a rate in deference to the FCC, or to an expected ruling on the appropriate rate to be charged for VNXX-routed ISP-bound traffic, is not a failure to act in light of the Commission's acknowledgment that such action is akin to the setting of a zero rate, and the parties' execution of and compliance with the remaining terms of the interconnection agreement in the interim three years. Furthermore, Level 3 seeks a review of the Commission's reasoning supporting its finding that VNXX-routed ISP-bound traffic is [*17] not subject to the reciprocal compensation provisions applicable to other ISP-bound traffic. Such a review of the Commission's underlying reasoning is properly conducted only by the courts.

The court finds that Level 3 is seeking judicial review of a final decision of the Commission and that the court has jurisdiction over the complaint under § 252(e)(6). That section provides, in pertinent part, that "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section." 47 U.S.C. 252(e)(6)(2007). This finding is consistent with the FCC's construction of § 252 in the *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 F.C.C.R. 15499, 16128 (1996) ("Local Competition Order"). The FCC took a restrictive view on what constitutes a state's failure to act and interpreted "failure to act" to mean "a state's failure to complete its duties in a timely manner", and limited Commission action to "instances where [*18] a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C)."

Even if the court were to assume that the Commission's decision not to set a rate for VNXX-routed ISP-bound traffic and to defer to the FCC on this issue constitutes a failure to act, the FCC has clearly held that an appeal to the federal district court under § 252(e)(6) and a petition for preemption to the FCC under § 252(e)(5) are not mutually exclusive, but rather alternative remedies. *In the Matter of Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(E)(5) of the Telecommunications Act of 1996*, 15 F.C.C.R. 11277, 11281 (2000) ("[B]y seeking relief concurrently in Federal district court and this Commission, Starpower has exercised its right to seek alternative remedies.") The fact that Level 3 has elected to pursue its remedies in this court under § 252(e)(6), rather than before the FCC under § 252(e)(5), does not divest this court of jurisdiction.

Having found that this court has jurisdiction over the matters [*19] before it, this court moves to address the merits of the claims presented.

II. Merits

A discussion of the merits of the pending motions for summary judgment requires an understanding of various FCC orders and court opinions addressing the applicability of the Act, and specifically, the reciprocal compensation provisions of § 251 (b)(5), to ISP-bound traffic. Congress directed the FCC to promulgate regulations implementing the Act's provisions. 47 U.S.C. §251(d)(1)(2007). Within six months, the FCC issued the *Local Competition Order* wherein it adopted initial rules designed to accomplish the goals of the Act and attempted to identify the forms of telecommunications covered by the various provisions of the Act. *Local Competition Order*, 11 F.C.C.R. at 15505. The FCC recognized that, as a legal matter, the transport and termination of local traffic are different services than access service for long distance telecommunications and noted that these services should be handled separately. Specifically, the FCC concluded that:

*section 251 (b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area, as defined in the following paragraph. [*20] We disagree with Frontier's contention that section 251 (b)(5) entitles an IXC⁴ to receive reciprocal compensation from a LEC when a long-distance call is passed from the LEC serving the caller to the IXC. Access charges were developed to address a situation in which three earners -- typically,*

the originating LEC, the IXC, and the terminating LEC -- collaborate to complete a long-distance call. As a general matter, in the access charge regime, the long-distance caller pays long-distance charges to the IXC, and the IXC must pay both LECs for originating and terminating access service. By contrast, reciprocal compensation for transport and termination of calls is intended for a situation in which two carriers collaborate to complete a local call. In this case, the local caller pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for completing the call. This reading of the statute is confirmed by *section 252(d)(2)(A)(i)*, which establishes the pricing standards for *section 251(b)(5)*. *Section 252(d)(2)(A)(i)* provides for "recovery by each carrier of costs associated with the transport and termination of each earner's network facilities [*21] of calls that originate on the network facilities of the other earner." We note that our conclusion that long distance traffic is not subject to the transport and termination provisions of *section 251* does not in any way disrupt the ability IXCs to terminate their interstate long-distance traffic on LEC networks. Pursuant to *section 251(g)*, LECs must continue to offer tariffed interstate access services just as they did prior to enactment of the 1996 Act. We find that the reciprocal compensation provisions of *section 251(b)(5)* for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic.

With the exception of traffic to or from a CMRS' network, state commissions have the authority to determine what geographic areas should be considered "local areas" for the purpose of applying reciprocal compensation obligations under *section 251 (b)(5)*, consistent with the state commissions' historical practice of defining local service areas for wireline LECs. Traffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges. We expect the states to determine [*22] whether intrastate transport and termination of traffic be-

tween competing LECs, where a portion of their local service areas are not the same, would be governed by *section 251(b)(5)*'s reciprocal compensation obligations or whether intrastate access charges should apply to the portions of their local service areas that are different.

Local Competition Order, 11 F.C.C.R at 16013-14 (explanatory footnotes added).

4 IXC is defined as interexchange carrier. *Local Competition Order, 11 F.C.C.R. at 15511.*

5 CMRS is defined as "commercial mobile radio service providers." *Local Competition Order at 15514.*

With the advent and growing popularity of the internet, the FCC naturally received inquiries regarding the appropriate handling of ISP-bound traffic under the Act. As is the case in the matter currently before the court, CLECs argued that ISP-bound traffic is local traffic subject to the reciprocal compensation provisions of *§ 251(b)(5)*, while ILECs asserted that ISP-bound traffic was interstate traffic beyond the scope of *§ 251 (b)(5)*. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Inter-Carrier Compensation for ISP-Bound Traffic), 14 F.C.C.R. 3689 (1999) [*23] ("Declaratory Ruling").*

In the *Declaratory Ruling*, the FCC described the typical arrangement for the processing of intercarrier ISP-bound calls. First, the call is earned by the originating LEC from the caller to the point of interconnection with the LEC servicing the ISP. The call is then carried by the LEC servicing the ISP from the point of interconnection to the ISP's local server. Finally, the ISP carries the call from its local server to the computer the caller desires to reach via the internet. *Declaratory Ruling, 14 F.C.C.R. at 3694.* Under this scenario, the call is local up until it reaches the ISP's local server. *Id.* (If these calls terminate at the ISP's local server, then they are intrastate calls and are subject to reciprocal compensation under the Act.) The call becomes interstate only when the ISP carries the call from the local server to the ultimate destination, specifically at an internet website that is more often than not located in another state. *Id. at 3697.*

The FCC rejected the argument that ISP-bound traffic should be separated into two components -- the intrastate telecommunications service provided by one or more LECs and the interstate [*24] information service provided by the ISP -- and characterized independently. Instead, the FCC found that "communications should be analyzed on an end-to-end basis, rather than by breaking the transmission into component parts." *Id. at 3700.* The

FCC reasoned that ISP-bound traffic at issue was properly characterized as interstate in that the communications did not terminate at the ISPs local server but continued onto the internet website located in another state despite the fact that the LEC or LECs providing the telecommunications service were located within a single state. *Id. at 3697.*

The FCC then addressed the issue of the appropriate compensation mechanism for ISP-bound traffic. With the characterization of such traffic as "interstate," the reciprocal compensation provisions in § 251(b)(5), which apply only to local communications, did not apply to ISP-bound traffic. However, in the absence of a federal rule governing intercarrier compensation for ISP-bound traffic, the FCC deferred to the state commissions and the parties to determine whether the reciprocal compensation scheme found in § 251(g) applies to such traffic. *Id. at 3703.* The FCC stated it would not interfere with the decisions [*25] of parties to an interconnection agreement who voluntarily included ISP-bound traffic within the provisions of the Act or state commissions who determine that reciprocal compensation is appropriate for ISP-bound traffic, provided there is no other conflict with governing federal law. *Id. at 3704-06.* "By the same token, in the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation method." *Id. at 3706.*

Various ILECs and CLECs petitioned the D.C. Circuit for review of the *Declaratory Ruling*. The ILECs objected to the FCC's conclusion that state commissions have the authority to impose reciprocal compensation on ISP-bound traffic despite the finding that such traffic is interstate and not subject to § 251(b)(5). *Bell Atl. Tel. Cos. v. Fed. Commc'ns Comm'n*, 206 F.3d 1, 3, 340 U.S. App. D.C. 328 (D.C. Cir. 2000). On the other hand, the CLECs asserted that the FCC erred in determining that ISP-bound traffic is not covered by § 251(b)(5). *Id.*

The court summarized the question presented to the FCC in the *Declaratory Ruling* as "whether calls to internet service providers ('ISPs') within the caller's local [*26] calling area are themselves 'local.'" *Id. at 2.* The court noted that the end-to-end analysis utilized by the FCC in determining that ISP-bound traffic was interstate in nature was traditionally used to determine whether a communication was within the FCC's jurisdiction, but that the FCC did not provide an explanation why this analysis "is relevant to discerning whether a call to an ISP should fit within the local call model of two collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs." *Id. at 3, 6.* In the absence of such an explanation, the court remanded the issue to the FCC for more reasoned decisionmaking. *Id. at 3.* Specifically, the court held:

Because the Commission has not provided a satisfactory explanation why LECs that terminate calls to ISPs are not properly seen as "terminat[ing] . . . local telecommunications traffic," and why such traffic is "exchange access" rather than "telephone exchange service," we vacate the ruling and remand the case to the Commission."

Id. at 9.

On remand, the FCC affirmed its prior decision that ISP-bound traffic was not subject to the reciprocal compensation provisions of § 251 (b)(5), but for a different [*27] reason. The FCC found "that Congress, through section 251(g), expressly limited the reach of section 251(b)(5) to exclude ISP-bound traffic." *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Inter carrier Compensation for ISP-Bound Traffic)*, 16 F.C.C.R. 9151, 9154 (2001)("Remand Order").

In the *Remand Order*, the FCC acknowledged that "an ISP's end-user customers typically access the Internet through an ISP server located in the same local calling area." *Id. at 9157.* It then focused on the language of the Act in determining where ISP-bound traffic falls within the provision of the Act. The FCC rejected its prior determination that, for purposes of reciprocal compensation, under § 251(b)(5), ISP-bound traffic was interstate, rather than local, in nature, in part because the term "local" is not defined in the Act and is, therefore, susceptible to varying meanings. The FCC then determined that a reasonable reading of § 251 "is that Congress intended to exclude the traffic listed in subsection (g) from the reciprocal compensation requirements of subsection (b)(5)." *Id. at 9166.* Accordingly, services properly characterized as "exchange [*28] access, information access, and exchange services for such access to interexchange carrier and information service providers" fell within subsection (g) and were not subject to section (b)(5). 47 U.S.C. §251(g)(2007); *Remand Order*, 16 F.C.C.R. at 9167.

The FCC characterized the services identified in § 251(g) as "access services or services associated with access" governed by federal or state regulations predating the Act. *Remand Order*, 16 F.C.C.R. at 9168. LECs historically provided such "access services to IXC and to information service providers in order to connect calls that travel to points -- both interstate and intrastate -- beyond the local exchange." *Id. at 9168.* The FCC found it reasonable that Congress did not want to disrupt these "pre-existing relationship[s]" and intentionally excluded

"all such access traffic from the purview of *section 251(b)(5)*," *Id.* Accordingly, "Congress preserved the pre-Act regulatory treatment of all the access services enumerated under *section 251(g)*." *Id. at 9169.*

The FCC concluded that Congress intended to adopt the definition of "information access" identified in the consent decree issued in *United States v. Am. Tel and Tel. Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982), [*29] which defined "information access" as "the provision of specialized exchange telecommunication services . . . in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services." *Remand Order at 9171.* It then found that "this definition of 'information access' was meant to include all access traffic that was routed by a LEC 'to or from' providers of information services, of which ISPs are a subset" and that "[b]ecause the legacy term 'information access' in *section 251(g)* encompasses ISP-bound traffic . . . , this traffic is excepted from the scope of the 'telecommunications' subject to reciprocal compensation under *section 251(b)(5)*." *Id. at 9171-72.*

The FCC indicated it made a mistake in the *Declaratory Ruling* by focusing on whether traffic was local or interstate, rather than on the specific language of the Act, to determine whether such traffic was subject to reciprocal compensation under § 251(b)(5). *Id. at 9172.* Similarly, the FCC modified its conclusion in the *Local Competition Order* that only local traffic was subject to § 251(b)(5). *Id. at 9173.* "We now [*30] hold that the telecommunications subject to those provisions are all such telecommunications not excluded by *section 251(g)*." *Id.*

Despite finding that the ISP-bound traffic was excepted from the reciprocal compensation provisions of § 251(b)(5) by § 251(g), the FCC determined that under the savings provision found in § 251(f), which provides that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under *section 201*", it had the authority to establish rules governing intercarrier compensation for interstate access service, such as ISP-bound traffic. *Id. at 9174-75.* In doing so, the FCC relied on the end-to-end analysis previously applied in the *Declaratory Ruling*, as well as the reasoning of the Eighth Circuit in *Southwestern Bell Tel. Co. v. Fed. Comm'ns Comm'n*, 153 F.3d 523, 543 (8th Cir. 1998), to determine that ISP-bound traffic should be considered interstate in nature. *Id. at 9175.* The FCC explained that the remanding court recognized that this analysis was appropriate for jurisdictional issues. *Id.*

In setting an interim compensation regime for ISP-bound traffic, the FCC was aware of regulatory arbitrage opportunities associated [*31] with intercarrier

payments. These opportunities resulted from the reciprocal compensation regime which were particularly apparent with respect to ISP-bound traffic due to the fact that ISPs generally generate large volumes of traffic that is virtually all one-way and a number of CLECs had targeted ISPs as customers to take advantage of these one-sided payments. *Id. at 9181.* The FCC opined that "a bill and keep approach to recovering the costs of delivering ISP-bound traffic is likely to be more economically efficient than recovering these costs from originating earners." *Id.* Under this approach, the originating ILEC would recover its costs from the customer placing the call and the CLEC would recover its costs from the ISP customer to which the call is delivered, rather than placing the bulk of the expense on the originating earner, and consequently, the originating earner's customer. *Id.* However, the FCC was concerned about the effect such a drastic change would have on the legitimate business expectations of carriers operating under agreements based on reciprocal compensation for ISP-bound traffic. *Id. at 9186.*

In light of these concerns, the FCC established caps for intercarrier [*32] compensation under an existing interconnection agreement, starting with a \$.0015 per minute of use and decreasing to \$.0007 per minute of use over a three-year period. *Id. at 9187.* These caps apply only when the ILEC agrees to exchange all § 251(b)(5) traffic at the same rate as ISP-bound traffic. Otherwise, the reciprocal compensation rate set by the state would apply to ISP-bound traffic. *Id. at 9193.* The FCC also imposed a cap on the total ISP-bound minutes for which a carrier may receive reciprocal compensation to the annualized payments received under an existing interconnection agreement plus an annual ten percent growth factor for the first two years. *Id. at 9187.* Where carriers were not exchanging traffic pursuant to an interconnection agreement prior to the effective date of the *Remand Order* (approximately June 2001), carriers were required to exchange ISP-bound traffic on a bill-and-keep basis until the FCC formally adopted a compensation regime for such traffic.⁶ *Id. at 9188.* The FCC's exercise of authority to under § 201 to create a compensation scheme for ISP-bound traffic eliminated any authority the state commission previously had to address the issue. *Id. at 9189.*

6 The [*33] FCC issued a companion Notice of Proposed Rulemaking to address the appropriate compensation regime with the *Remand Order*.

Various CLECs wasted no time in petitioning the D.C. Circuit for review of the *Remand Order*, arguing that the FCC erred in determining that ISP-bound traffic fell within the services excepted from the reciprocal compensation requirements of § 251(b)(5) by § 251(g).

Worldcom, Inc. v. Fed. Commc'ns Comm'n, 288 F.3d 429, 432, 351 U.S. App. D.C. 176 (D.C. Cir. 2002) ("*Worldcom I*"). Additionally, several states filed their own petition asserting that the *Remand Order* "unlawfully preempt[ed] their authority to determine the compensation of ISP-serving LECs," *Id.* Once again, the court rejected the analysis used by the FCC to except ISP-bound traffic from § 251(b)(5). The court found that § 251(g) did not except ISP-bound traffic from § 251(b)(5) for a variety of reasons. First, the court noted that § 251(g) "is worded simply as a transitional device, preserving various LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules pursuant to the Act" and did not support the FCC's interpretation that it created an ongoing exception to § 251(b)(5). *Id.* at 430, 432-32. [*34] Second, § 251(g) continues any pre-Act obligations and the FCC did not identify "any pre-Act federally created obligation for LECs to interconnect to each other for ISP-bound calls." *Id.* at 433. Last, the court limited § 251(g) to services provided "to interexchange earners and information service providers", which did not include "LECs' services to other LECs, even if en route to an ISP [because such services] are not 'to' either an IXC or an ISP." *Id.* at 433-34. The court did not vacate the remainder of the *Remand Order*, noting that many of the petitioners favored the bill-and-keep compensation method, but simply remanded the case for further proceedings. *Id.* at 434. Additionally, the court did not address any of the other issues posed by the parties. The court did appear to reaffirm the FCC's finding in the *Local Competition Order* that the reciprocal compensation requirement of § 251(b)(5) is limited to local traffic. *Id.* at 430-31 ("Although [the Act's] literal language purports to extend reciprocal compensation to all 'telecommunications,' the Commission has construed it as limited to 'local' traffic only.")

With the rules adopted in the *Remand Order* left untouched by the court [*35] and remaining in place, Core Communications, Inc, a CLEC, ("Core") filed a petition with the FCC asking the FCC to forbear from enforcing the interim rules. *Petition of Core Communications, Inc. for Forbearance under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, 19 F.C.C.R. 20179 (2004) ("*Forbearance Order*"). The FCC granted Core's petition with regard to the growth cap and the application of bill-and-keep to new markets but denied the petition with regard to the rate caps and the "mirroring rule" requiring ILECs to offer to exchange all § 251(b)(5) traffic at the rates set in the *Remand Order*. *Forbearance Order*, 19 F.C.C.R. at 20184.

Core petitioned the D.C. Circuit for review of the *Forbearance Order* arguing that the FCC should have granted its petition on all interim provisions and an ILEC

filed a similar petition asserting that the FCC should have denied Core's petition in its entirety. *In Re Core Commc'ns, Inc.*, 455 F.3d 267, 270, 372 U.S. App. D.C. 182 (D.C. Cir. 2006) ("*Core I*"). The court described the reciprocal compensation arrangement required under the Act as follows:

"[w]hen a customer of carrier A makes a local call to a customer of carrier B, and earner B uses its facilities to connect, [*36] or 'terminate,' that call to its own customer, the 'originating' carrier A is ordinarily required to compensate the 'terminating' carrier B for the use of carrier B's facilities."

Id. at 270 (quoting *SBC Inc. v. FCC*, 414 F.3d 486, 490 (3rd Cir. 2005)). The court found the FCC's analysis and conclusions set forth in the *Forbearance Order* to be reasonable and denied both petitions, leaving the rate caps and mirroring rule in place. *Core I* at 283. The FCC subsequently denied a second petition for forbearance filed by Core leaving the rate cap and mirroring rule in place. *In the Matter of Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rides*, 22 F.C.C.R. 14118 (2007).

When the FCC did not promptly consider the issues remanded by the court in *Worldcom I*, Core twice petitioned the D.C. Circuit for a writ of mandamus seeking an order compelling the FCC to explain the legal basis for the compensation structure applicable to ISP-bound traffic. The court dismissed the first petition filed in 2005 with leave to refile in the event of significant additional delay. *In Re Core Commc'ns, Inc.*, 531 F.3d 849, 850, 382 U.S. App. D.C. 120 (D.C. Cir. 2008) ("*Core* [*37] *II*"). In 2008, the court granted the second petition finding that the FCC's failure to address the issues remanded for over six years was egregious. *Id.* The court directed the FCC to "explain the legal basis for its ISP-bound compensation rules within six months. . . ." *Id.* The court characterized the calls at issue in the *Remand Order* as "dial-up" calls and explained that:

[U]nder the dial-up method, a consumer uses a line provided by a local exchange carrier (LEC) -- usually an incumbent local exchange earner (ILEC) - to dial the local telephone number of an Internet service provider (ISP), which then connects the call to the Internet. Typically, the ISP does not subscribe to the ILEC, but instead subscribes to another LEC -- a competitive local exchange

carrier (CLEC) - that interconnects with the incumbent. Accordingly, a customer who dials up to the Internet usually obligates and originating ILEC to transfer the call to a CLEC, which then delivers the call to the ISP.

Id. at 850-51.

On remand, the FCC confirmed its authority to impose rules on ISP-bound traffic under §§ 201 and 251(i). *In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, 24 F.C.C.R. 6475, 6476 (2008) ("Mandamus [*38] Order"). First, it concluded "that the scope of section 251(b)(5) is broad enough to encompass ISP-bound traffic" and that "section 251(b)(5) is not limited to local traffic." *Id.* at 6479. The FCC explained that:

The Act broadly defines "telecommunications" as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Its scope is not limited geographically ("local," "intrastate," or "interstate") or to particular services ("telephone exchange service," "telephone toll service," or "exchange access"). We find that the [ISP-bound] traffic we elect to bring within this framework fits squarely within the meaning of "telecommunications."

Id. at 6479. The FCC reaffirmed its general holding that traffic encompassed by § 251 (g) is excluded from § 251(b)(5) but acknowledged that the D.C. Circuit had clearly held that ISP-bound traffic did not fall within the parameters of § 251(g). *Id.* at 6483. "As a result, we find that ISP-bound traffic clearly falls within the scope of section 251(b)(5)." *Id.*

Having found that the communications at issue were subject to § 251(b)(5), the FCC [*39] then determined that because the communications were clearly interstate in nature, § 251 (i) placed such communications under the FCC's authority under § 201.

In sections 251 and 252 of the Act, Congress altered the traditional regulatory framework based on jurisdiction by expanding the applicability of national rules to historically intrastate issues and state rules to historically interstate issues. In

the *Local Competition First Report and Order*, the Commission found that the 1996 Act created parallel jurisdiction for the Commission and the states over interstate and intrastate matters under section 251 and 252. The Commission and the states "are to address the same matters through their parallel jurisdiction over both interstate and intrastate matters under sections 251 and 252. Moreover, section 251 (i) provides that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201. In the *Local Competition First Report and Order*, the Commission concluded that section 251(i) "affirms that the Commission's preexisting authority under section 201 continues to apply for purely interstate activities."

Id. at 6483-84 (footnotes omitted.) [*40] The court then reasoned that "[b]ecause we re-affirm our findings concerning the interstate nature of ISP-bound traffic, which have not been vacated by any court, it follows that such traffic falls under the Commission's section 201 authority preserved by the Act and that we therefore have the authority to issue pricing rules pursuant to that section." *Id.* at 6484-85. "In sum, the Commission plainly has authority to establish pricing rules for interstate traffic, including ISP-bound traffic, under section 201 (b), and that authority was preserved by section 251(i)." *Id.* at 6486. Under this authority, the FCC kept the rate caps and mirroring rule in place pending the opportunity to adopt a more comprehensive intercarrier compensation reform. *Id.* at 6489.

Level 3 asserts that the analysis set forth in these FCC orders and court opinions, especially that found in the *Mandamus Order*, clearly applies to all ISP-bound traffic, including the VNXX-routed ISP-bound traffic at issue here. Level 3 notes that the FCC recognized in the *Mandamus Order* that the language of § 251(b)(5) covers all telecommunications, and that the FCC explicitly ruled that § 251(b)(5) covers ISP-bound traffic. Level [*41] 3 then argues that because the FCC did not specifically except, or suggest in its analysis any possible basis to except, VNXX-routed ISP-bound traffic from the reciprocal compensation provisions of § 251(b)(5), in the *Mandamus Order*, such traffic is subject to the rate cap and mirroring rule identified in the *Remand Order* and continued in the *Mandamus Order*. Qwest argues that the Commission properly found that the *Remand Order*, which was in effect at the time the Order was issued, did not impose reciprocal compensation on VNXX-routed ISP-bound traffic, and that the *Mandamus Order* does

nothing to alter this. The Commission joins in Qwest's arguments.⁷

7 The Commission also contends that it was within its authority to prohibit VNXX traffic in the state of Oregon and, therefore, had clear authority to condition Level 3's provision of VNXX service as set forth in the Order. Level 3 does not dispute this authority. Accordingly, this issue is not currently before, and need not be addressed, by this court.

It is clear, and Level 3 appears to concede, that at the time the Order was entered, the FCC orders addressing the application of the reciprocal compensation provisions of § 251(b)(5) to ISP-bound [*42] traffic were not applicable to VNXX-routed ISP-bound traffic. This is supported both by the language of the various FCC orders and case law construing such orders in existence at that time, and also by a number of cases specifically finding that the FCC orders did not apply to VNXX-routed ISP-bound traffic.

In the *Local Competition Order*, the FCC clearly distinguished between local and interexchange, or long distance, communications and found that the "reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic." *Local Competition Order*, 11 F.C.C.R. at 16013. The FCC left to the states the responsibility for determining "whether intrastate transport and termination of traffic, between competing LECs, where a portion of their local service areas are not the same, would be governed by section 251(b)(5)'s reciprocal compensation obligations or whether intrastate access charges should apply to the portions of their local service areas that are different." *Id.* at 16013-14. From the outset, the FCC differentiated between local calls between two LECs and calls [*43] between two LECs traveling outside of the local service areas covered by the LECs and gave the states the authority to continue access charges for the latter.

When the FCC first addressed the issue of ISP-bound traffic, it made clear the traffic it was considering was local calls between two LECs with a subsequent transport to the internet website. *Declaratory Ruling*, 14 F.C.C.R. at 3691. (Under one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area.) The court reviewing the *Declaratory Ruling* summarized the question at issue as "whether calls to internet service providers ('ISPs') within the caller's local calling area are themselves 'local.'" *Bell Atl.*, 206 F.3d at 2. On remand, the FCC again acknowledged that "an ISP's end-user customers typically access the Internet through an ISP

server located in the same local calling area," *Remand Order*, 16 F.C.C.R. at 9157. One court reviewing the interim compensation regime of the *Remand Order* described the reciprocal compensation arrangement set forth in § 251(b)(5) as applying "[w]hen a customer of carrier A makes a local call to a customer of carrier B" *Core I*, 455 F.3d at 270. [*44] Similarly, the court in *Core II* described the dial-up calls at issue as being placed by a customer of an ILEC to dial "the local telephone number of an Internet service provider. . . ." *Core II*, 531 F.3d at 850.

In each of these orders, the FCC was clearly considering the type of compensation applicable to ISP-bound traffic originating with a local call between two LECs in the same calling area. There is no indication that the FCC was addressing issues relevant to VNXX-routed ISP-bound traffic or that the rulings in the orders was applicable to such traffic. Accordingly, it is not reasonable to find that the FCC's rulings to this point govern the VNXX-routed ISP-bound traffic currently at issue. This conclusion is supported by a number of court cases addressing the applicability of reciprocal compensation and the FCC's construction of the Act and its application to VNXX-routed ISP-bound traffic.

In *Global NAPS I*, the First Circuit recognized that the interim compensation regime set in the *Remand Order* preempted state regulation of intercarrier compensation for local ISP-bound calls and then addressed the question of whether the preemption extends to interexchange VNXX ISP-bound traffic. [*45] *Global NAPS I*, 444 F.3d at 65. The court relied on the requirement that an agency make their intentions clear if they intend to preempt state regulation in a specific area, and found that because the *Remand Order* was, at best, ambiguous on whether it applied to interexchange VNXX ISP-bound traffic, it was insufficient to preempt state regulation in this area. *Id.* at 71-2. The court rejected the argument that because the FCC did not expressly limit itself to ISP-bound traffic originating and terminating within a local calling area, the *Remand Order* should apply to all ISP-bound traffic. *Id.* at 72.

The FCC has consistently maintained a distinction between local and "interexchange" calling and the intercarrier compensation regimes that apply to them, and reaffirmed that states have authority over intrastate access charge regimes. Against the FCC's policy of recognizing such a distinction, a clearer showing is required that the FCC preempted state regulation of both access charges and reciprocal compensation for ISP-bound traffic.

Indeed, in the *Remand Order* itself, the FCC reaffirmed the distinction between reciprocal compensation and access charges. It noted that Congress, in passing the [*46] [Act], did not intend to disrupt the pre-[Act] access charge regime, under which "LECs provided access services . . . in order to connect calls that travel to points -- both interstate and intrastate -- beyond the local exchange. In turn, both the Commission and the states had in place access regimes applicable to this traffic, which they have continued to modify over time."

Furthermore, the context in which the *Remand Order* was issued casts doubts on Global NAPs' contention. The Supreme Court has held that in interpreting its own prior cases "[i]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." Such a rule also properly applies to interpretations of agency orders, especially where the order itself details the background against which it was passed.

The issue that necessitated FCC action in the [*Declaratory Ruling*] and the *Remand Order* was "whether reciprocal compensation obligations apply to the delivery of calls from one LECs end-use customer to an ISP in the same local calling area that is served by a competing LEC. The order expressly holds at a number of points that ISP-bound [*47] traffic is not subject to reciprocal compensation under § 251(b)(5). There is no express statement that ISP-bound traffic is not subject to access charges.

Id. at 73-4 (citations omitted). In a brief filed by the FCC at the court's request, the FCC noted that the *Remand Order* does not provide a clear answer to the question presented and could be read to address all calls placed to ISPs, but acknowledged that the administrative history indicates that the FCC was focused on "calls between dial-up users and ISPs in a single calling area." *Id.* at 74. The FCC admitted that it "has not addressed application of the *Remand Order* to ISP-bound calls outside a local calling area" or "decided the implications of using VNXX numbers for intercarrier compensation generally." *Id.*

In another case initiated by Global NAPs, Inc., the Second Circuit addressed the ability of a state to require access charges on local, interexchange traffic and to prohibit use of VNXX arrangements. *Global NAPS Inc. v. Verizon New England, Inc.*, 454 F.3d 91 (2nd Cir. 2006) ("*Global NAPs II*"). The Second Circuit noted that "[t]he FCC has in recent years considered the question whether Internet telecommunications traffic is subject [*48] to reciprocal compensation but has never directly addressed the issue of ISP-bound calls that cross local-exchange areas." *Id.* at 95. The court, relying, at least in part, on the ultimate conclusion of the FCC in the *Remand Order* "that ISP-bound traffic within a single calling area is not subject to reciprocal compensation," found that the FCC had not stripped state commissions of their authority to define local calling areas with respect to intercarrier compensation. *Id.* at 99. The court did not decide whether state commissions had the authority to impose access fees on ISP-bound traffic. *Id.* With regard to VNXX arrangements, the court distinguished VNXX technology from calls subject to reciprocal compensation based on the extension of VNXX calls into different local calling areas, noted that the FCC had recently noted the lack of clear precedents and rules governing the proper application of reciprocal compensation to VNXX traffic, and held that the states retained the ability to prohibit LECs from using VNXX arrangements within the state. *Id.* at 100-01.

In *Peevey*, the California Public Utility Commission ("CPUC") addressed the appropriate means for compensation between ILECs and [*49] CLECs for delivery of calls to ISPs through both local and virtual local traffic. *Peevey*, 462 F.3d at 1145. The CPUC, which traditionally identifies calls as "local" based on the numbers assigned to the calling and called parties, not the routing of the call or the geographical locations of the parties to the call, characterized all intrastate ISP-bound traffic as local. *Id.* at 1149-50. The CPUC determined that such traffic fell within the rate cap set forth in the *Remand Order* for all ISP-bound traffic but that the rate cap could not be applied retroactively to the existing interconnection agreement. *Id.* at 1150. However, the CPUC distinguished between local calls and virtual local calls and allowed the ILEC to collect call origination charges from the CLEC to compensate for the transport of VNXX calls over long distances. *Id.* The Ninth Circuit upheld the CPUC's determination that VNXX traffic was interexchange traffic and recognized the state commission's authority to regulate VNXX ISP-bound traffic.

[T]he FCC's imposition of rate caps on ISP-bound traffic, and simultaneous preemption of state authority to address compensation for ISP-bound traffic, are not relevant. Those rate caps [*50] are

intended to substitute for the reciprocal compensation that would otherwise be due to CLECs for terminating local ISP-bound traffic. They do not affect the collection of charges by ILECs for originating interexchange ISP-bound traffic. As this issue was not before the FCC when it crafted the ISP Remand Order, the order does not preclude the CPUC's ruling.

Peevey, 462 F.3d at 1158-59.

Our neighboring district court also found that, as of 2007, ISP-bound VNXX traffic was not subject to reciprocal compensation under rules under the Act. *Qwest Corp. v. Washington State Utilities and Transp. Comm'n*, 484 F. Supp. 2d 1160 (W.D. Wa. 2007). The court found that the *Remand Order* did not "eliminate the distinction between 'local' and 'interexchange traffic' traffic and the compensation regimes that apply to each -- namely, reciprocal compensation and access charges" and that the scope of the *Remand Order* is limited to ISP-bound traffic within a single local calling area. *Id.* at 1170, 1172. In a case even closer to home, Judge Aiken of this court clearly held that reciprocal compensation does not apply to VNXX traffic. *Qwest Corp. v. Universal Telecom, Inc.*, No. Civ. 04-6047-AA, 2004 U.S. Dist. LEXIS 28340, 2004 WL 2958421, at *10 (D. Or. Dec. 15, 2004) ("VNXX [*51] traffic, whether ISP bound or not, is not subject to reciprocal compensation.")

Having concluded that the law in existence prior to the issuance of the *Mandamus Order* clearly establishes that VNXX-routed ISP-bound traffic was not subject to reciprocal compensation under the Act, the court will now address what effect, if any, the *Mandamus Order* has on this conclusion. **Level 3** argues that the FCC's use of broad terms, such as "interstate, interexchange" ISP-bound traffic, in the *Mandamus Order* clearly includes VNXX traffic, and that the FCC extended the scope of the reciprocal compensation requirement by recognizing that it is "not limited by type of traffic, by type of carrier with which the traffic is exchanged, or by considerations of geography." (**Level 3's** Reply Mem. at 30.) **Level 3** also contends that the FCC's rejection of the argument that § 251 (b)(5) should apply to only "local" traffic is a clear indication that the FCC was rejecting the distinction between VNXX ISP-bound traffic, which is not local, from other ISP-bound traffic, which is local.

The FCC acknowledged in the *Mandamus Order* that it was responding to the writ of mandamus issued in *Core II*, which directed it only [*52] to explain the basis for its ISP-bound compensation rules which, at that time, were clearly limited to ISP-bound calls originating

from a call within a local calling area. *Mandamus Order*, 24 F.C.C.R. at 6476. The FCC concluded in the *Mandamus Order* only that it had the authority to impose traffic rules for these ISP-bound calls. *Id.* Nowhere in the *Mandamus Order* did the FCC indicate that it was expanding the reciprocal compensation rules to other types of traffic. In fact, the FCC held only that the definition of telecommunications used in the Act was broad enough to encompass the ISP-bound traffic they had elected to bring within the coverage of § 251(b)(5). *Id.* at 6479. The fact that FCC found that § 251 (b)(5) is not limited to local traffic does nothing to extend the coverage of the *Mandamus Order*, as the FCC clearly rejected its prior ruling in the *Remand Order* that only local traffic was covered under the Act, and held that all telecommunications, other than those excluded by § 251 (g), were covered by the Act. The *Mandamus Order* did nothing more than affirm the FCC's conclusion in the *Remand Order*.

In light of the history behind the *Mandamus Order*, the narrow view of the ISP-bound [*53] traffic considered in, and covered by, the previous FCC orders, by both the FCC and the courts, and the absence of any expression of intent by the FCC to expand the coverage of the *Mandamus Order* to include VNXX-route, ISP-bound traffic, the court finds that the *Mandamus Order* does not impose reciprocal compensation requirements on VNXX-routed, ISP-bound traffic. Decisions from the First, Ninth, and D.C. Circuits support this conclusion.

The D.C. Circuit reviewed, and affirmed, the FCC's rate cap system for ISP-bound traffic set forth in the *Mandamus Order* in *Core Commc'ns, Inc. v. Fed. Commc'ns Comm'n*, 592 F.3d 139, 389 U.S. App. D.C. 86 (D.C. Cir. 2010). The court described dial-up internet traffic as "special because it involves interstate communications that are delivered through local calls; it thus simultaneously implicates the regimes of both § 201 and §§ 251-252." *Id.* at 144. Clearly, the court limited the application of the rate cap system, and the *Mandamus Order*, to ISP connections obtained through local calls.

The First Circuit again addressed a complaint filed by Global NAPs, Inc., seeking review of a interconnection agreement requiring it to pay long distance access charges whenever ISP traffic [*54] was routed outside the caller's local areas, regardless of the number being called. *Global NAPs, Inc. v. Verizon New England Inc.*, 603 F.3d 71 (1st Cir. 2010) ("*Global NAPs III*"). The court rejected Global NAPs' argument that the *Mandamus Order* made it clear that the *Remand Order* preempted the state commission's authority to regulate the traffic finding that the *Mandamus Order* "is not materially different from the [*Remand Order*] on the issues of concern to us, and our holding in [*Global NAPs I*] applies to this case as well." *Id.* at 81. The court indicated that it ruled in *Glob-*

al NAPs I that "the [Remand Order] did not govern interexchange VNXX traffic" *Id.* at 79. The court explained that the *Mandamus Order* "simply clarified" the legal support for the FCC's authority to regulate local ISP traffic and prevent regulatory arbitrage and that the issues addressed in the *Mandamus Order* "did not go regulation of intercarrier compensation." *Id.* at 82. "Here, the FCC has not exercised jurisdiction over interexchange traffic. Our conclusion that the FCC preempted only state regulation of local ISP traffic remains unaffected." *Id.* at 83. In reaching this conclusion, the court addressed, and rejected, [*55] arguments currently asserted by Level 3 -- that the FCC's determination that § 251(b)(5) is not limited to local traffic and its use of the terms "interstate" and "interexchange" in describing ISP-bound traffic expand coverage of the *Mandamus Order* to include VNXX-routed ISP-bound traffic. *Id.* at 82-83.

Finally, the Ninth Circuit has recognized that the FCC "has not exercised its jurisdiction over all manifestations of ISP-bound traffic" in the *Remand Order* and related pronouncements, including the *Mandamus Order*. *AT & T Commc'ns of Cal, Inc. v. Pac-West Telecomm, Inc.*, 651 F.3d 980, 991 (9th Cir. 2011)(citing, among others, *Global NAPs III*, 603 F.3d at 81-82). In fact, the court characterized this limitation of the FCC's orders relating to the treatment of ISP-bound traffic under the Act "well-settled." *Id.*

The VNXX-routed ISP-bound traffic at issue here is not covered by the *Remand Order* or the *Mandamus Order*, and is not subject to the reciprocal compensation provisions of § 251 (b)(5) or the compensation regime established by the FCC for local, non-VNXX ISP-bound traffic. The Commission's handling of VNXX-routed ISP-bound traffic in the *Order* was well considered, in accordance with [*56] the Act and federal law, and within its authority. The *Order* should be affirmed and

the parties should be compensated according to its terms.⁸

8 Qwest's alternative arguments in the event the court found that the *Mandamus Order* requires reciprocal compensation for VNXX-routed ISP-bound traffic -- that the *Mandamus Order* should not be applied retroactively or that VNXX-routed ISP-bound traffic is within § 251(g) and therefore, excepted from § 251(b)(5) -- are moot and will not be addressed by the court.

Conclusion

Qwest's motion (#30) and the Commission's motion (#29) should be GRANTED. Level 3's motion (#26) should be DENIED and the complaint dismissed with prejudice.

Scheduling Order

The Findings and Recommendation will be referred to a district judge for review. Objections, if any, are due **November 10, 2011**. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 26th day of October, 2011.

/s/ [*57] John V. Acosta

JOHN V. ACOSTA

United States Magistrate Judge

EXHIBIT B

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

PAC-WEST TELECOMM, INC.,	)	DOCKET UT-053036
	)	(consolidated)
Petitioner,)	
	)	ORDER 13
v.)	
)	
QWEST CORPORATION,	)	ORDER DENYING PETITION FOR
	)	RECONSIDERATION
Respondent.)	
.....)	
)	
LEVEL 3 COMMUNICATIONS, LLC,)	
)	
Petitioner,	)	DOCKET UT-053039
	)	(consolidated)
v.)	
	)	ORDER 13
QWEST CORPORATION,)	
	)	ORDER DENYING PETITION FOR
Respondent.	)	RECONSIDERATION
.....)	

I. INTRODUCTION

1 NATURE OF PROCEEDINGS. In these consolidated proceedings, the Washington Utilities and Transportation Commission (Commission) responds to a remand order from the United States District Court for the Western District of Washington (District Court). The remand order originated with an action by Qwest Corporation (Qwest)¹ in the United States District Court challenging the Commission’s final orders in

¹ Following the Commission’s final order in Docket UT-100820, entered on March 14, 2011, Qwest Communications International, Inc., the parent company of Qwest Corporation, merged with CenturyTel, Inc., becoming CenturyLink. We continue to refer to Qwest in this order given the long history of these cases.

Dockets UT-053036 and UT-053039.² In those 2006 orders, the Commission granted Pac-West Telecomm, Inc.'s (Pac-West) and Level 3 Telecommunications, LLC's (Level 3) (collectively Competitive Local Exchange Carriers, or CLECs) petitions for enforcement of their interconnection agreements with Qwest. The Commission found that the CLECs were entitled to compensation for calls bound for Internet service providers (ISP) using "VNXX"³ traffic arrangements provided by the CLECs, without regard to whether such calls were considered local or interexchange. In its review, the District Court disagreed with the Commission's analysis and remanded the case to the Commission. The District Court directed the Commission to reinterpret the Federal Communications Commission's (FCC's) order on compensation for ISP-bound traffic, known generally as the *ISP Remand Order*,⁴ and to classify VNXX ISP-bound traffic as within or outside a local calling area in reaching a decision on the CLECs' petitions for enforcement.

- 2 **APPEARANCES.** Lisa A. Anderl and Adam Sherr, Seattle, Washington, and Thomas Dethlefs, Denver, Colorado, represent Qwest, now CenturyLink. Arthur A. Butler, Ater Wynne, LLP, Seattle, Washington, represents Pac-West. Lisa Rackner, McDowell Rackner & Gibson PC, Portland, Oregon, and Christopher W. Savage, Davis Wright Tremaine LLP, Washington, D.C., represent Level 3.
- 3 **PROCEDURAL HISTORY.** The Commission issued Order 12, its final order in these proceedings, on November 14, 2011, deciding competing motions for summary

² Under Section 252(e)(6) of the Telecommunications Act of 1996, state commission decisions in arbitrating interconnection agreements between carriers, as well as the enforcement of such agreements, are subject to judicial review in federal district court, to ensure state commission compliance with federal law. See 47 U.S.C. § 252(e)(6); see also *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 5635 U.S. 635, 643-44, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002).

³ "VNXX" or "Virtual NXX" refers to a carrier's acquisition of a telephone number for one local calling area that is used in another geographic area. Even though the call is between local calling areas (*i.e.*, a long distance or toll call), the call appears local based on the telephone number.

⁴ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, Order on Remand and Report and Order, FCC 01-131, 16 FCC Rcd 9151 (2001) (*ISP Remand Order*).

determination filed by Pac-West, Level 3 and Qwest,⁵ determining, as described below, that VNXX calls occur outside a local calling area.

- 4 On November 28, 2011, Pac-West and Level 3 filed a joint petition for reconsideration of Order 12.
- 5 On December 1, 2011, the Commission issued a notice requesting an answer from Qwest, and noting that the Commission would enter an order on the petition for reconsideration by January 15, 2012. Qwest filed its answer to the CLECs' petition for reconsideration on December 12, 2011.
- 6 On January 13, 2012, the Commission issued a further notice that it would enter an order on the petition by February 10, 2012.
- 7 On January 31, 2012, Qwest filed Supplemental Authority with the Commission.⁶

II. MEMORANDUM

A. The Commission's Final Order

- 8 In deciding the issues in this proceeding, the Commission followed the District Court's remand instructions to:

⁵ *Pac-West Telecomm, Inc. v. Qwest Corporation*, Docket UT-053036, and *Level 3 Communications, LLC v. Qwest Corporation*, Docket UT-053039 (Consolidated), Order 12, Order Denying Pac-West's Motion for Summary Determination; Denying Level 3's Motion for Summary Determination; Granting in Part and Denying in Part Qwest's Motion for Summary Determination; and Denying Qwest's Motion to Strike, or in the Alternative File a Reply, (November 14, 2011) (*Order 12*). The procedural history of these consolidated matters is set forth fully in the Commission's final order, Order 12, and will not be repeated here.

⁶ Qwest submitted an order of the United States District Court for the District of Oregon, Portland Division, which dismissed a case between Level 3, Qwest and the Public Utility Commission of Oregon, based on the recommendations of a magistrate judge. See *Level 3 Communications v. Public Utility Commission of Oregon, et al.*, No. 3:10-CV-01030-AC (D. Or. Jan. 13, 2012); See *Level 3 Communications v. Public Utility Commission of Oregon, et al.*, No. 3:10-CV-01030-AC (D. Or. Oct. 27, 2011). Qwest also submitted the magistrate judge's order. While the discussion in those orders is relevant to the underlying issue we decided in Order 12, the orders are not directly applicable to the issues raised in the petition for reconsideration.

reinterpret the *ISP-Remand Order* as applied to the parties' interconnection agreements, and classify the instant VNXX calls, for compensation purposes, as within or outside a local calling area, to be determined by the assigned telephone numbers, the physical routing points of the calls, or any other chosen method within the WUTC's discretion.⁷

In following these directions, the Commission considered the following sources: The parties' briefs and supplemental authority, the parties' interconnection agreements, Sections 251(b)(5) and 251(g) of the Telecommunications Act of 1996 (the Act),⁸ prior federal court decisions on the issues, the FCC's *Mandamus Order*⁹ (the order responding to the remand of the FCC's *ISP Remand Order* entered subsequent to the District Court's decision), the Commission's analysis in the *Final VNXX Order*¹⁰ in a case involving VNXX traffic arrangements, and state law.¹¹

9 In its final order, Order 12, the Commission found that Pac-West and Level 3 are entitled to neither reciprocal compensation nor the ISP-bound traffic rate established in the FCC's *ISP Remand Order* for intrastate VNXX ISP-bound traffic. Specifically, the Commission determined that the FCC's *ISP Remand Order* and *Mandamus Order* addressed only compensation for traffic within a local calling area, not intrastate, interexchange traffic.¹² The Commission found that states retain authority under Section 251(g) of the Act to apply access or toll charges to intrastate interexchange traffic, i.e., traffic outside of a local calling area.¹³ Based on provisions of state law, rule, Qwest's tariffs and the parties' interconnection agreements, the Commission

⁷ *Order 12*, ¶ 32, quoting *Qwest v. Washington Utils. & Transp. Comm'n*, 484 F. Supp. 2d 1160, 1177 (W.D. Wash., 2007) (*Qwest*).

⁸ 110 Stat. 56, Pub. L. 104-104 (Feb. 8, 1996).

⁹ *In re High Cost Universal Service Support, et al.*, WC Docket 05-337, et al., FCC 08-262, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262, 24 FCC Rcd 6475 (2008) (*Mandamus Order*).

¹⁰ *Qwest Corp. v. Level 3 Communications, LLC, et al.*, Docket UT-063038, Order 10, Final Order Upholding Initial Order; Granting in Part and Denying in Part Petitions for Administrative Review; Modifying Initial Order, Approving Settlement, (July 16, 2008) (*Final VNXX Order*).

¹¹ *Order 12*, ¶¶ 16-45.

¹² *Id.* ¶¶ 57, 60.

¹³ *Id.* ¶¶ 20, 58-60.

found that VNXX calls occur outside a local calling area.¹⁴ Finally, consistent with the District Court's direction, the Commission determined that the parties' interconnection agreements do not require Qwest to compensate the CLECs for the VNXX traffic in question either using the FCC's ISP-bound traffic rate or reciprocal compensation under Section 251(b)(5) of the Act.¹⁵ Rather, the Commission determined that the parties' agreements likely require the CLECs to pay Qwest for their interexchange or IntraLATA toll traffic.¹⁶

B. The Petition for Reconsideration

10 The CLECs make three specific arguments for why the Commission should reconsider all or part of Order 12, but argue, overall, that the Commission answered the wrong question. We consider and reject each of these arguments for the reasons discussed below.

1. Does Order 12 Answer the Appropriate Question?

11 The CLECs claim the Commission's "fundamental error" in Order 12 was "to apply traditional, legacy regulatory concepts ... to ISP-bound calls handled via modern, efficient VNXX arrangements."¹⁷ They assert that the Commission should have asked "what regulatory treatment of VNXX ISP-bound traffic makes policy and regulatory sense in light of the unique characteristics of such traffic and the ongoing transition of the industry away from dial-up and towards broadband as the primary means of Internet access?"¹⁸ By focusing on the wrong question, the CLECs argue the Commission reached the wrong answer.

12 We reject the CLECs' assignment of error as a misreading of the District Court's directive. While the question the CLECs pose is an interesting one, it is not the direction the District Court gave to the Commission on remand to resolve the CLECs' petitions for enforcement of their interconnection agreements with Qwest. The

¹⁴ *Id.* ¶¶ 72-74.

¹⁵ *Id.* ¶¶ 90-95.

¹⁶ *Id.* ¶¶ 90-95.

¹⁷ Petition, at 2.

¹⁸ *Id.*

Commission's role in this case is not to set policy prospectively for "regulatory treatment" of new or emerging service arrangements. Rather, the issues before the Commission stem from agreements executed as long as ten years ago. These agreements will remain in force until the parties negotiate different terms. Our decision in Order 12 resolves disputes from the past based on our interpretation of the applicable law. Despite the CLECs' position, at no time was this proceeding intended to establish a compensation regime or policy for the future. The Commission recognizes that the FCC has set a course for the future in its recent *USF/ICC Order*,¹⁹ which the CLECs correctly identify as establishing a "going-forward intercarrier compensation system".²⁰ No aspect of that order, however, implicates or controls actions taken under preceding telephone traffic arrangements subject to pre-existing law and policy.

2. Does the FCC's Recent Order Require the Commission to Reconsider Order 12?

¹³ Despite recognizing the prospective effect of the *USF/ICC Order*, the CLECs argue that the FCC's decision requires that we reconsider our decision in Order 12 concerning the scope of reciprocal compensation under Section 251(b)(5). Specifically, the CLECs argue that the FCC's recent order clarifies that the Section 251(g) exclusion from reciprocal compensation under Section 251(b)(5) is limited to whether the carrier serving an ISP is acting as a local exchange carrier (LEC) rather than as an interexchange or information service provider.²¹ They also assert that the Commission must reconsider its decision of whether VNXX traffic is subject to reciprocal compensation by applying the definition of "telephone exchange service" and determining whether VNXX service is comparable to traditional local service.²² While the CLECs acknowledge that VNXX service is geographically interexchange in nature, they claim that they are appropriately acting as LECs under the definition of "telephone exchange service" in providing VNXX traffic, and further, that VNXX

¹⁹ *Connect America Fund, et al.*, Docket Nos. WC 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) (*USF/ICC Order*).

²⁰ Petition, n.4.

²¹ Petition, at 3, *citing USF/ICC Order*, ¶ 958.

²² *Id.* at 5.

traffic is comparable to traditional local exchange service.²³ For this reason, they argue the Commission erred in finding that VNXX service is not exchange service.

14 Qwest disputes both the CLECs' interpretation of the FCC's recent order, as well as the argument that they provide a local exchange service through VNXX arrangements.²⁴ Qwest asserts that the FCC focused on the function the carrier performs in determining its classification under Section 251(g), and that function is determined by the nature of the traffic.²⁵ As to the definition, Qwest asserts that under the Act, a LEC "is engaged in the provision of telephone exchange or exchange access," which is dependent on whether the service is "within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area".²⁶ Qwest argues that service between local calling areas, which is the case with VNXX, is interexchange service, and that the definition of "telephone exchange service" does not turn on whether the carrier uses local dialing patterns.²⁷ Further, Qwest requests the Commission reject the CLECs' petition on this point, as the CLECs did not raise this definitional issue in the many rounds of pleadings in this proceeding.²⁸

15 We do not read the definition of "telephone exchange service" to include the VNXX service the CLECs provide. Neither do we read the portion of the definition which allows a "comparable service" to apply to the CLECs' VNXX service. A "comparable service" must still be provided "within an exchange or connected system of exchanges," i.e., a local calling area.²⁹ As we stated in Order 12, "[s]tate law distinguishes local and interexchange traffic based on the geographic endpoints of the call."³⁰ However, these proceedings ultimately concern enforcement of the CLECs' interconnection agreements with Qwest, and the terms of those agreements determine

²³ *Id.* at 4-5.

²⁴ Qwest Answer, ¶¶ 5-7.

²⁵ *Id.* ¶¶ 8-9, citing *USF/ICC Order*, ¶¶ 956-58.

²⁶ *Id.* ¶¶ 10-11, citing 47 U.S.C. § 153(32), (54).

²⁷ *Id.* ¶¶ 11-12.

²⁸ *Id.* ¶ 13.

²⁹ 47 U.S.C § 153 (54).

³⁰ *Order 12*, ¶ 73.

the compensation for the VNXX traffic at issue. The CLECs ignore the actual terms of their agreements in their petition for reconsideration. As we noted in Order 12, those agreements define the following types of service: "Exchange Service," "Access Service," and "Exchange Access (IntraLATA Toll)".³¹ While the Act may define "telephone exchange service," the parties specifically defined the types of service allowed under the agreements, including "Exchange Service," which determines the compensation due under the agreements. We continue to find that these contractual definitions and terms control the outcome of this proceeding.

16 In addition, we find that the CLECs' had numerous opportunities to raise the issue of the definition during the many rounds of briefing in this case and have failed to do so. The Commission has held previously that a petition for reconsideration must demonstrate errors of law or facts not reasonably available to the petitioner at the time of the hearing.³² Accordingly, the CLECs' argument is not timely and need not be considered.

17 In addition, while the CLECs' claim the *USF/ICC Order* determines the outcome of this case, it clearly does not. The FCC's order is prospective in nature, and establishes rules governing intercarrier compensation going forward. In its order, the FCC states:

[S]ection 251(g) preserves access charge rules only during a transitional period, which ends when we adopt superseding regulations. Accordingly, to the extent section 251(g) has preserved state intrastate access rules against the operation of section 251(b)(5) until now, this rulemaking supersedes the provision.³³

Thus, Section 251(g) preserved intrastate access charge rules in place during the transitional period, the period between the effective date of the Act and the effective

³¹ *Id.* ¶¶ 91-95.

³² *Application GA-75968 of Sureway Medical Services, Inc.*, Order M.V.G. 1674, Commission Decision and Order Denying Reconsideration at 3 (Dec. 20, 1993); *Application GA-868 of Sureway Incineration, Inc.*, Order M.V.G. 1475, Commission Decision and Order Denying Reconsideration; Affirming Final Order at 2 (Feb. 14, 1991); *Application No. GA-849 of Superior Refuse Removal Corp.*, Order M.V.G. No. 1357, Commission Decision and Order Denying Reconsideration, Affirming Final Order Denying Application at 2 (Sept. 20, 1988).

³³ *USF/ICC Order*, ¶ 766.

date of the FCC's *USF/ICC Order*. As the VNXX traffic in question in this proceeding occurred during this transitional period, we find the FCC's recent order is not dispositive of the issues in this proceeding.

- 18 Further, reviewing paragraphs 956 through 958 of the *USF/ICC Order*, the FCC stated that whether Section 251(g) applies depends not on whether a particular service existed prior to the Act, but whether there was a "pre-Act obligation relating to intercarrier compensation for" particular traffic exchanged between a LEC and interexchange carriers and information service providers.³⁴ In addressing certain Voice over Internet Protocol (VoIP) service, the FCC considered the nature of the service provided, i.e., whether it was interexchange, not the type of service provided, in determining whether to apply the Section 251(g) exclusion.³⁵
- 19 Moreover, the order clearly deals with and distinguishes application of the nation's federal and state access charge regime to telecommunications traffic exchanged between LECs, interexchange carriers, and information service providers, including the telecommunications traffic at issue in the instant proceeding. Referring in part to emerging traffic arrangements of the type embraced by the CLECs here (such as VNXX ISP-bound traffic), the FCC provided clear guidance as to the appropriate pre-existing treatment of such traffic:

Regardless of whether particular VoIP services are telecommunications services or information services, there are pre-1996 Act obligations regarding LECs' compensation for the provision of exchange access to an IXC or an information service provider. Indeed, the Commission has already found that toll telecommunications services transmitted (although not originated or terminated) in IP were subject to the access charge regime, and the same would be true to the extent that telecommunications services originated or terminated in IP.³⁶

- 20 For the reasons we discuss above, we reject the CLECs' petition on this issue.

³⁴ *Id.*, ¶ 956.

³⁵ *Id.* ¶ 957.

³⁶ *Id.* (footnotes omitted).

3. Does Order 12 Reach an Incorrect Decision Based on Policy Reasons?

- 21 The CLECs take issue with the policy arguments in paragraph 61 of Order 12, asserting that the Commission expressed misplaced concern for the impact of the loss of access charges on universal service funding for small and rural local exchange companies.³⁷ The CLECs argue that the Commission inappropriately based its decision about classification of VNXX traffic on policy arguments about the effect of classifying all ISP-bound calls as interstate traffic subject to the FCC's rate. They argue that neither Level 3 nor Pac-West has paid originating access charges to rural LECs in connection with calls to VNXX numbers, and that as dial-up traffic is declining, it is inconsistent to conclude harm to rural LECs.³⁸ The CLECs also argue that the FCC's *USF/ICC Order* makes the Commission's policy concerns moot, as the order removes the role of state commissions in setting terminating access rates and reduces intrastate terminating access rates to interstate levels by July 2013.³⁹ Further, the CLECs claim that paragraph 61 of the order is inconsistent with WAC 480-120-540 because terminating access charges, which facilitate carriers obtaining universal service funding, would never apply to VNXX traffic.⁴⁰ Based on these issues, the CLECs argue the Commission should reconsider its decision in Order 12 to classify VNXX traffic as interexchange.
- 22 In response, Qwest asserts that the issues Pac-West and Level 3 raise do not warrant reconsideration of the Commission's policy determination that VNXX calls should be classified as interexchange as a matter of state law.⁴¹ Qwest states that the Commission's concern about the effect on rural LECs was not its sole policy concern supporting the Commission's decision to classify VNXX calls as non-local.⁴² Qwest

³⁷ Petition, at 6.

³⁸ *Id.*

³⁹ *Id.* at 6-7.

⁴⁰ *Id.* at 7.

⁴¹ Qwest Answer, ¶ 19.

⁴² *Id.* ¶¶ 14, 18.

notes that the CLECs admit they have not paid originating access charges for VNXX traffic, which impacts the ability of carriers to appropriately recover the costs of originating interexchange traffic, regardless of declining dial-up traffic.⁴³ Qwest argues that it is irrelevant whether the FCC in its *USF/ICC Order* has removed a role for states in setting terminating access charges: VNXX traffic should result in originating access charges and the FCC has only capped originating access charges, deferring further consideration until a later date.⁴⁴ Finally, Qwest asserts that nothing in the Commission's terminating access charge rule, WAC 480-120-540, requires reconsideration of Order 12, as the Commission's policy concerns were broader than the concern about rural carriers being deprived of universal service monies.⁴⁵

23 Our decision in Order 12 resolved issues of law in dispute between the parties in keeping with the District Court's direction. The policy concerns expressed in paragraph 61 of the order are not the sole basis for the decision. As such, our decision would remain the same without the policy arguments. Nevertheless, as Qwest points out, the CLECs demonstrate the need for the policy concern in their arguments against it. They admit to not paying originating access charges for VNXX traffic, yet these charges compensate carriers for the cost of originating interexchange traffic.

24 Finally, as we discuss above, the FCC's order does not provide a basis for reconsideration of Order 12. The *USF/ICC Order* applies prospectively, while the traffic in this case, and any policy concerns about compensation for the traffic, occurred prior to the FCC's order. Thus, we reject the CLECs' petition on this issue.

4. Should Collateral Estoppel Apply to CenturyLink?

25 The CLECs' final argument for reconsideration is that Qwest, which was recently acquired by CenturyLink, should be collaterally estopped from arguing that intrastate access charges apply to VNXX ISP-bound traffic. They argue that CenturyLink has taken a position "diametrically opposed" to Qwest's in Louisiana. In *CenturyTel of*

⁴³ *Id.* ¶¶ 15, 17.

⁴⁴ *Id.* ¶ 16.

⁴⁵ *Id.* ¶ 18.

Central Louisiana v. MCIMetro Access Transmission Services,⁴⁶ CenturyLink successfully argued that ISP-bound calls are inherently interstate in nature, and should never be subject to access charges.⁴⁷ The CLECs argue that it is unjust and inequitable to allow CenturyLink to seek the opposite result in this proceeding. Based on an analysis of Washington law on collateral estoppel and a review of the two cases, the CLECs argue that the Commission should apply the doctrine in this case, precluding Qwest from requesting compensation for VNXX ISP-bound traffic though access charges.

26 Qwest argues that collateral estoppel does not apply in this proceeding to preclude Qwest from arguing that the CLECs owe Qwest intrastate originating access charges. First, Qwest notes that the CLECs submitted the Louisiana decision to the Commission as supplemental authority in July 2011, and stated in the submission that the cases have “similar”, not identical, issues. Qwest argues that the Commission had an opportunity to consider the potential for collateral estoppel prior to entering its final order and that reconsideration is not warranted.⁴⁸

27 Second, Qwest argues that the Louisiana decision does not meet the criteria for applying the doctrine of collateral estoppel as the facts and issues are different. In the Louisiana case, the parties – CenturyLink and a Verizon company – did not have an interconnection agreement, and the issue was payment of terminating access charges on VNXX traffic to ISP modems located outside of the state of Louisiana.⁴⁹ Further, Verizon, the carrier using VNXX number assignment, had an intrastate tariff in place that differed from how the Louisiana commission had determined optional exchange access service should be treated, and Verizon’s intrastate tariff did not apply to interstate traffic.⁵⁰ Unlike the present case, all of the traffic in question terminated to modems located outside of the state. Qwest argues that the issues in the cases are not identical, and thus the doctrine of collateral estoppel does not apply.

⁴⁶ Order No. U-31211, 2011 La. PUC LEXIS 68 (La. PUC May 10, 2011). The CLECs filed this case as supplemental authority with the Commission on July 28, 2011.

⁴⁷ Petition, at 7-8.

⁴⁸ Qwest Answer, ¶ 21.

⁴⁹ *Id.* ¶ 22.

⁵⁰ *Id.* ¶¶ 23-24.

28 The doctrine of collateral estoppel works to bar “relitigation of issues of ultimate fact that have been determined by final judgment.”⁵¹ Collateral estoppel will work to bar relitigation of an issue only if all four criteria are met:

(1) The identical issue was decided in the prior adjudication, (2) the prior adjudication resulted in a final judgment on the merits, (3) collateral estoppel is asserted against the same party or a party in privity with the same party to the prior application, and (4) precluding relitigation of the issue will not work an injustice.⁵²

29 We conclude, after reviewing the Louisiana decision, that the exact issue litigated in proceeding, and the facts involved, are not identical to the issue here. The question in the Louisiana case was whether intrastate access charges would apply to interstate ISP-bound VNXX traffic under tariff. In this case, the question focuses on intrastate ISP-bound VNXX traffic and whether compensation is due under the parties’ interconnection agreements. For this reason, the doctrine of collateral estoppel does not bar Qwest from arguing that the VNXX traffic at issue here is subject to intrastate access charges. As the issue litigated in Louisiana is not identical to the relevant issue here, we need not determine the merits of the remaining criteria.⁵³ We deny the CLECs’ petition on this issue.

30 Based on our review and analysis of the CLECs’ petition and Qwest’s answer, we deny the CLECs’ petition for reconsideration of Order 12, the final order in this proceeding.

⁵¹ *Williams v. Leone & Keeble, Inc.*, 171 Wn. 2d 726, 731, 254 P.3d 818, 821 (2011), citing *State v. Vasquez*, 148 Wash.2d 303, 308, 59 P.3d 648 (2002).

⁵² *Williams*, 171 Wn. 2d at 731, citing *Clark v. Baines*, 150 Wn. 2d 905, 913, 84 P.3d 245 (2004).

⁵³ Even if we concluded that the first three criteria had been satisfied, we believe application of the doctrine would unfairly impact Qwest. The CLECs argue that failing to apply the doctrine will work an injustice by allowing CenturyLink to game the regulatory system. However, the test is whether *applying* the doctrine will work an injustice. Given the long history of the parties in this proceeding and the very recent acquisition of Qwest by CenturyLink, it would work an injustice to apply the doctrine against Qwest/CenturyLink in this case for that recent action, potentially denying the company millions of dollars in compensation for unpaid access charges.

III. ORDER

31 **THE COMMISSION ORDERS** That the petition for reconsideration of Order 12 filed by Pac-West and Level 3 is denied.

DATED at Olympia, Washington, and effective February 10, 2012.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

PAC-WEST TELECOMM, INC.,	)	DOCKET UT-053036
	)	<i>(consolidated)</i>
Petitioner,)	
	)	ORDER 12
v.)	
)	
QWEST CORPORATION,	)	FINAL ORDER
)	
Respondent.)	
.....)	
)	
LEVEL 3 COMMUNICATIONS, LLC,)	
	)	DOCKET UT-053039
Petitioner,	)	<i>(consolidated)</i>
)	
v.	)	ORDER 12
)	
QWEST CORPORATION,	)	FINAL ORDER
)	
Respondent.)	
.....)	

**ORDER DENYING PAC-WEST'S MOTION FOR SUMMARY
DETERMINATION; DENYING LEVEL 3'S MOTION FOR SUMMARY
DETERMINATION; GRANTING IN PART AND DENYING IN PART
QWEST'S MOTION FOR SUMMARY DETERMINATION; AND DENYING
QWEST'S MOTIONS TO STRIKE, OR IN THE ALTERNATIVE FILE A
REPLY**

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I. INTRODUCTION

1 **NATURE OF PROCEEDINGS.** In these consolidated proceedings, the Washington Utilities and Transportation Commission (Commission) responds to a remand order from the United States District Court for the Western District of Washington (District Court). The remand order originated with an action by Qwest Corporation (Qwest)¹ in the District Court challenging the Commission's final orders in Dockets UT-053036 and UT-053039. In those orders, the Commission granted Pac-West Telecomm, Inc.'s (Pac-West) and Level 3 Telecommunications, LLC's (Level 3) (collectively Competitive Local Exchange Carriers, or CLECs) petitions for enforcement of their interconnection agreements with Qwest. The Commission found that the CLECs were entitled to compensation for calls bound for Internet service providers (ISP) using "VNXX"² traffic arrangements, without regard to whether such calls were considered local or interexchange. The District Court disagreed with the Commission's analysis and remanded the case to the Commission. The District Court directed the Commission to reinterpret the Federal Communications Commission's (FCC's) order on compensation for ISP-bound traffic, known generally as the *ISP Remand Order*,³ and to classify VNXX ISP-bound traffic as within or outside a local calling area in reaching a decision on the CLECs' petitions for enforcement.

2 **APPEARANCES.** Lisa A. Anderl, Associate General Counsel, and Adam Sherr, Senior Counsel, Seattle, Washington, represent Qwest. Arthur A. Butler, Ater Wynne, LLP, Seattle, Washington, represents Pac-West. Lisa Rackner, McDowell Rackner & Gibson PC, Portland, Oregon, Gregory L. Rogers, In-house counsel, Denver, Colorado, and Tamar E. Finn, Bingham McCutchen LLP, Washington, DC, represent Level 3.

¹ Following the Commission's final order in Docket UT-100820, entered on March 14, 2011, Qwest Corporation merged with CenturyTel, Inc., becoming CenturyLink. We continue to refer to Qwest in this order given the history of the cases.

² "VNXX" or "Virtual NXX" refers to a carrier's acquisition of a telephone number for one local calling area that is used in another geographic area. Even though the call is between local calling areas (*i.e.*, a long distance or toll call), the call appears local based on the telephone number.

³ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, Order on Remand and Report and Order, FCC 01-131, 16 FCC Rcd 9151 (2001) (*ISP Remand Order*).

- 3 **PROCEDURAL HISTORY.** The procedural history and context of these proceedings is complex, involving two sets of cases before the Commission and two separate appeals in United States District Court. To fully understand this history, it is important to also track the varied decisions of the FCC and the opinions of the D.C. Circuit first rejecting and finally accepting varying legal rationales put forth by the FCC. In this section, we set forth briefly the administrative history before the Commission and the related appeals to United States District Court. In a subsequent section, we describe the thrusts and parries of the D.C. Circuit and the FCC.
- 4 The underlying petitions for enforcement in these proceedings were filed on June 9, 2005, and June 21, 2005, by Pac-West and Level 3, respectively. For purposes of this decision, we term these the “enforcement cases.” In their petitions, the CLECs asked the Commission to enforce the terms of their interconnection agreements with Qwest concerning compensation for traffic to ISPs, including VNXX traffic. In counterclaims, Qwest asserted the traffic in question was not subject to compensation as ISP-bound traffic and that the CLECs’ use of VNXX was illegal.
- 5 On February 10, 2006, the Commission resolved the disputes in these enforcement cases on motions for summary determination. The Commission interpreted the CLECs’ interconnection agreements and the FCC’s *ISP Remand Order*, finding as a matter of law that Qwest must compensate the CLECs for ISP-bound traffic, regardless of whether the traffic originated and terminated within the same local calling area. Pac-West seeks to enforce an agreement the Commission approved on February 14, 2001, in Docket UT-013009, and an ISP-bound traffic amendment to this agreement approved on March 12, 2003, in the same docket. Level 3 seeks enforcement of an agreement approved by the Commission in March 2003 in Docket UT-023042.
- 6 On May 23, 2006, Qwest commenced a separate administrative proceeding by filing a complaint with the Commission in Docket UT-063038 against nine CLECs, including Pac-West and Level 3. For purposes of this decision, we term this complaint the “VNXX complaint.” In the complaint, Qwest asserted that the CLECs violated state law by using VNXX arrangements to provide ISP-bound service, avoiding access charges.
- 7 On July 10, 2006, Qwest appealed the Commission’s final orders in the enforcement cases to the U.S. District Court for the Western District of Washington, asking the court to overturn the Commission’s orders in those cases.

- 8 On April 9, 2007, the District Court issued its decision on the Qwest appeal in the enforcement cases.⁴ The court found the Commission's decision in violation of federal law and inconsistent with the FCC's *ISP Remand Order* and remanded the case to the Commission for further proceedings in several identified areas.
- 9 On October 5, 2007, a Commission administrative law judge entered an initial order in the VNXX complaint (*Initial VNXX Order*),⁵ finding that VNXX traffic is not *per se* unlawful, but is lawful only if subject to appropriate compensation. The *Initial VNXX Order* found that VNXX traffic includes characteristics of both local and interexchange traffic and should be subject to a "bill and keep"⁶ compensation mechanism.
- 10 On February 15, 2008, the Commission stayed proceedings on the District Court's remand of the enforcement cases until the Commission entered a final order in the VNXX complaint.
- 11 On July 16, 2008, the Commission entered its final order in the VNXX complaint (*Final VNXX Order*),⁷ upholding the *Initial VNXX Order's* finding that VNXX service was lawful if compensation between the carriers was appropriate. The Commission further found that VNXX ISP-bound traffic was interexchange (non-local) in nature, and ordered that bill-and-keep compensation would apply to all intrastate interexchange VNXX traffic.⁸

⁴ *Qwest v. Washington Utils. & Transp. Comm'n*, 484 F. Supp. 2d 1160 (W.D. Wash., 2007) (*Qwest*).

⁵ *Qwest Corp. v. Level 3 Communications, LLC, et al.*, Docket UT-063038, Order 05, Initial Order (October 5, 2007) (*Initial VNXX Order*).

⁶ Bill and keep is a compensation mechanism that requires each carrier to bill its own customers for a service, rather than billing another carrier.

⁷ *Qwest Corp. v. Level 3 Communications, LLC, et al.*, Docket UT-063038, Order 10, Final Order Upholding Initial Order; Granting in Part and Denying in Part Petitions for Administrative Review; Modifying Initial Order, Approving Settlement, n.2 (July 16, 2008) (*Final VNXX Order*).

⁸ In the *Final VNXX Order*, ¶¶ 21-22, the Commission stated:

VNXX traffic arrangements occur when the carrier assigns a telephone number from a rate center (NXX) in a local calling area different from the one where the customer is physically located. For example, a customer in Seattle is assigned a number for a local calling area in Olympia. The effect of this assignment is that a call to the VNXX number appears to terminate within the Olympia local calling area, but will actually terminate in the Seattle local calling area. Because intercarrier compensation depends on whether this

- 12 On August 7, 2008, the Commission consolidated for decision the Pac-West and Level 3 enforcement cases.
- 13 On September 12, 2008, Level 3 and other parties appealed the Commission's *Final VNXX Order* to federal district court. On June 19, 2010, the court stayed a decision in that case pending the Commission's decision on the court's remand in this proceeding involving the enforcement cases.
- 14 On February 10, 2009, Pac-West, Level 3, and Qwest filed motions for summary determination in the consolidated enforcement proceedings, asking that the Commission resolve the District Court's remand in light of their interpretations of the FCC's decisions in the *ISP Remand Order* and the more recently issued *Mandamus Order*.⁹ On March 26, 2009, the parties filed responses to the motions, followed by various procedural steps in the remanded enforcement cases:
- On April 2, 2009, Qwest filed a motion to strike portions of Pac-West's and Level 3's responses to the motions for summary determination. On April 9, 2009, Pac-West and Level 3 filed responses to Qwest's motion to strike.
 - On June 3 and 4, 2009, Level 3 and Qwest, respectively, filed supplemental authority.
 - On June 18 and 21, 2009, the parties waived an initial order in this proceeding.

call is classified as "local" (subject to reciprocal compensation) or interexchange (subject to access charges), the classification decision is central to determining who pays whom and how much.

The great majority of VNXX calls are made to ISPs (ISP-bound traffic). CLECs use VNXX arrangements primarily to serve their ISP customers. VNXX enables the ISP dial-up customers to connect with the Internet without incurring toll or access charges.

(Citations omitted.)

⁹ *In re High Cost Universal Service Support, et al.*, WC Docket 05-337, et al., FCC 08-262, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262, 24 FCC Rcd 6475 (2008) (*Mandamus Order*).

- On July 21, 2010, the parties filed additional initial supplemental briefs addressing the decision by the U.S. Court of Appeals, Washington, D.C. Circuit (DC. Circuit) in *Core III*, upholding the FCC's *Mandamus Order*.¹⁰
- On August 11, 2010, the parties filed responses to the initial supplemental briefs.

II. MEMORANDUM

15 The primary issue in this proceeding on remand of the enforcement cases is whether the rate the FCC established in its 2001 *ISP Remand Order* for terminating ISP-bound traffic¹¹ applies only to calls to an ISP that originate and terminate within a local calling area, or whether the rates apply to all ISP-bound calls, including calls between exchanges (*i.e.*, interexchange) and calls commonly referred to as virtual NXX (VNXX) traffic.¹² There is a significant history of case law on this subject, as well as an extensive procedural history on this issue before the Commission. It is worth noting that the issue arose primarily as a consequence of the explosive growth of dial-up internet traffic during the latter half of the 1990s which, eventually, was eclipsed by broadband service.¹³ Thus, the dispute here centers on traffic passed between Qwest and other carriers at a time when dial-up traffic was extensive and certain

¹⁰ *Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 597 (2010) (*Core III*).

¹¹ When carriers terminate calls that originate from customers of another local exchange carrier, the originating carrier must pay the terminating carrier reciprocal compensation under section 251(b)(3) of the Act. In the *ISP Remand Order*, the FCC established a lower rate for terminating ISP-bound traffic, \$.0007 per minute. The parties dispute which rate applies to terminating VNXX ISP-bound traffic, but do not dispute the rates.

¹² The Commission has more fully defined VNXX service as when a carrier acquires a telephone number for a specific local calling area but calls made to that number actually terminate in another geographic area, although the calls appear to the caller to be local calls. *Final VNXX Order*, n.2, *citing Pac-West Telecom, Inc. v. Qwest Corp.* Docket UT-053036, Order 05, Final Order Affirming and Clarifying Recommended Decision, n.1 (Feb. 10, 2006) and *Level 3 Communications, LLC v. Qwest Corp.* Docket UT-053039, Order 05, Order Accepting Interlocutory Review; Granting, in Part and Denying, in Part, Level 3's Petition for Interlocutory Review, ¶ 10, n.4 (Feb. 10, 2006).

¹³ Because of the continued proliferation of broadband and the corresponding decrease in dial-up access to the Internet, the issue in this proceeding, on a prospective basis, will be of decreasing significance.

carriers such as Pac-West and Level 3 “specialized” in serving ISPs, in part, to obtain the benefit of revenue from the higher reciprocal compensation rates that they assumed would apply to terminating ISP-bound traffic.

A. Legal and Regulatory Background

- 16 In the *Final VNXX Order*, the Commission provided an extensive discussion of the rating (*i.e.*, determining whether the call is treated as a local or long distance call for rating purposes) and routing of telephone calls, as well as of the legal and regulatory background related to ISP-bound calls and their delivery by VNXX service arrangements in particular.¹⁴ As that discussion holds true today, we only summarize it briefly here.
- 17 Historically, incumbent local exchange providers (ILECs), such as Qwest, assigned customer telephone numbers on the basis of the geographic location of the customer’s telephone. The geographically assigned numbers were used to route and rate the calls to and from that number, for purposes of compensation between carriers.
- 18 A telephone number typically has ten digits, labeled by telecommunications carriers as NPA-NXX-XXXX. The first three digits are known as the Numbering Plan Area (NPA) or area code. The second set of three digits is the exchange or NXX code. These codes generally correspond to geographic areas served by a local exchange carrier¹⁵ that operates central offices and switches that are identified by NXX codes. When a customer dials a number, the NXX code helps direct that call to a particular central office and in turn helps to route that call to the called number on the terminating end. Historically, the NXX number determines whether a call is to terminate within or outside the local calling area. This in turn determines whether a call is rated a local call or an interexchange call, and determines call compensation between carriers.
- 19 If a call is rated as local, then it is generally subject to reciprocal compensation rates. This means that if a local call is between customers served by two carriers, the carriers charge one another for the traffic. The carrier originating the call would bill the customer (normally through a monthly rate) and would compensate the carrier terminating the call for that service. In contrast, interexchange calls are subject to

¹⁴ *Final VNXX Order*, ¶¶ 16-54.

¹⁵ See *Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1147-48. (9th Cir. 2006) (*Peevey*).

intrastate access charges. In the latter circumstance, a customer's long distance carrier bills the customer for the call and then in turn pays the local telephone company or companies for originating or terminating the call. Interexchange calls that are made to geographic locations within the state are termed intrastate interexchange calls. For these calls, the state commission may set rates. Interexchange calls that cross state boundaries are classified as interstate calls, subject to the FCC's ratemaking jurisdiction.

- 20 As discussed below, the access charge system remains in effect, despite numerous changes to the telecommunications industry that commenced with the passage of the Telecommunications Act of 1996 (the Act).¹⁶ In the *Final VNXX Order*, the Commission described section 251(g) of the Act:

The Act preserved in section 251(g) the existing compensation scheme for interstate and intrastate interexchange and information access traffic, but under section 251(b)(5) required local exchange carriers to apply a new form of compensation, known as reciprocal compensation, to the transport and termination of telecommunications traffic. The FCC determined that reciprocal compensation obligations under section 251(b)(5) apply only to traffic that originates and terminates within a local calling area, such that the customer initiating the call pays the originating carrier and the originating carrier must pay the terminating carrier for completing the call.¹⁷

- 21 The section 251(b)(5) reciprocal compensation regime for local calling was assumed to be "reciprocal," with a roughly equal balance of compensable traffic exchanged between carriers. However, this did not prove true between carriers affected by the rapid growth of end-users subscribing to dial-up access to the internet. Many CLECs

¹⁶ 110 Stat. 56, Pub. L. 104-104 (Feb. 8, 1996). Section 251(g) of the Act, 47 U.S.C. §251(g), states that each wire line local exchange company

shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and non-discriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier [at the time of enactment of the Act] until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment.

¹⁷ *Final VNXX Order*, ¶ 18 (citations omitted). Section 251(b)(5) of the Act, 47 U.S.C. §252(b)(5), imposes on every local exchange company "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."

began to serve customers seeking a connection to the internet. Calls to an ISP are usually lengthy and are not reciprocal – the ISP does not call you back. Thus, the CLECs identified an opportunity to generate significant revenue by charging other carriers (the carriers generally serving the end users initiating a dial-up call to ISPs) for termination of the ISP-bound calls, but did not themselves have to pay similar termination charges. This imbalance in ISP-bound traffic created an unreasonable arbitrage opportunity among carriers and eventually prompted the FCC, and the courts, to issue several orders intended to address the imbalance.

1. FCC Action up to the *ISP Remand Order*

a. *Declaratory Ruling*

22 The FCC first addressed this subject in 1999 in what has been termed the *Declaratory Ruling*.¹⁸ In the *Declaratory Ruling*, the FCC focused only on ISP-bound traffic that originated and terminated within a local area because that was where CLECs were benefitting most from arbitrage related to ISP-bound calls.¹⁹ At that time, most ISP-bound calls were made to ISP modems located within local calling areas. The FCC determined that, though the caller and the ISP were located in the same calling area, the ultimate destination of the call to the ISP was an internet site. Therefore, under this “end-to-end” analysis, the FCC determined that ISP-bound calls were interstate in nature and thus subject to FCC jurisdiction under section 201 of the Act. However, the FCC found that under existing interconnection agreements between carriers, those calls might be subject to reciprocal compensation under section 251(b)(5) of the Act. The D.C. Circuit, in the *Bell Atlantic* case, however, found the FCC’s jurisdictional analysis inadequate in light of other FCC precedents and therefore remanded the case to the FCC.²⁰ On remand, the FCC released a second order in 2001, the *ISP Remand Order*.²¹

¹⁸ *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) (*Declaratory Ruling*).

¹⁹ *Id.* ¶ 4: “Under one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area.” See also *ISP Remand Order*, ¶¶ 10, 13.

²⁰ *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) (*Bell Atlantic*).

²¹ See n.3, *supra*.

b. ISP Remand Order

- 23 In the *ISP Remand Order*, the FCC affirmed its end-to-end basis for determining that ISP-bound calls were “jurisdictionally” interstate in nature. As mandated by the D.C. Circuit, the FCC elaborated on its earlier analysis, deciding that ISP-bound calls are subject to the FCC’s exclusive jurisdiction and not subject to the reciprocal compensation requirements of section 251(b)(5). However, the FCC determined that ISP-bound calls are not “telecommunications services,” but are “information services” and, pursuant to section 251(g) of the Act, they fall outside the reciprocal compensation requirement in section 251(b)(5).²² Exercising its authority under section 251(g), the FCC set a compensation level for ISP-bound calls, which has become the most prominent feature of the *ISP Remand Order*. The new compensation scheme, to be applied prospectively to ISP-bound calls, reflected a gradually declining per-minute-of-use charge, capped after 36 months at \$.0007 per minute.²³ The order also established growth caps, determined how the compensation scheme would apply in new markets and applied a “mirroring rule,” which requires ILECs to apply the ISP traffic rate to all calls subject to compensation under section 251(b)(5), or apply reciprocal compensation rates to ISP-bound traffic.²⁴ In essence, the effect of the *ISP Remand Order* was to create, on an interim basis, a new category of traffic for which a “non-access charge” rate would apply until the FCC adopted rules to modify the existing intercarrier compensation scheme.²⁵
- 24 This interim compensation scheme reflected the FCC’s concern that the existing intercarrier compensation scheme “created opportunities for regulatory arbitrage and distorted the economic incentives for competitive entry into the local exchange and

²² *ISP Remand Order*, ¶¶ 34-35.

²³ The FCC envisioned a three-year transition for CLECs to change their intercarrier practices, but deferred an ultimate decision on bill and keep for all ISP-bound traffic to the Intercarrier Compensation docket addressing comprehensive reform. See *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132 (rel. Apr. 27, 2001).

²⁴ *ISP Remand Order*, ¶¶ 8, 81, 86, 89.

²⁵ *Id.* ¶2. Simultaneously with the *ISP Remand Order*, the FCC issued a Notice of Proposed Rulemaking in CC Docket 01-92, to develop a unified carrier compensation regime. See n 23, *supra*. On October 27, 2011, the FCC unanimously voted to comprehensively reform the intercarrier compensation system in the “Connect America Fund & Intercarrier Compensation Reform Order and Further Notice of Proposed Rulemaking” in Common Carrier Dockets 10-90, 09-51, 07-135, 05-337, 01-92, 96-45, 03-109, and 10-208, but has not yet released the order.

exchange access markets.”²⁶ The interim compensation mechanism allowed the FCC to pursue its stated goal to wean carriers, particularly CLECs, from reliance on reciprocal compensation payments and transition them towards a “bill and keep” compensation regime.²⁷ Bill and keep requires carriers to recover most, if not all, of their own costs from their own end users, and eliminates reliance on or the incentive to exploit the arbitrage opportunity associated with a per-minute reciprocal compensation system.²⁸ In contrast, under reciprocal compensation, carriers serving ISPs could generate large payments from originating carriers for the traffic imbalance created by the one-way calling patterns generated by their ISP customers.²⁹ Despite the FCC’s efforts, however, questions and disputes quickly arose about how to interpret the *ISP Remand Order*, in part because the FCC was not sufficiently clear about the scope of the ISP-bound traffic to which its new compensation scheme applied.

c. World Com Decision

25 A number of carriers challenged the FCC’s *ISP Remand Order*, and once again the D.C. Circuit criticized the FCC’s analysis. In its *WorldCom* decision,³⁰ the D.C. Circuit rejected the FCC’s decision to classify ISP-bound calls as falling under section 251(g). Because there was no ISP-bound traffic prior to the Act, the D.C. Circuit reasoned that the FCC could not rely on section 251(g) of the Act for authority to set rates for ISP-bound traffic. The court concluded that section 251(g) is simply a transitional device that preserves obligations that predated the Act until the FCC devises new compensation rules. However, the *WorldCom* decision did not vacate the *ISP Remand Order*; nor did it overturn the FCC’s determination that ISP-bound calls were jurisdictionally interstate in nature. Rather, the court remanded the case to the FCC, directing the agency to better develop its assertion of authority to regulate ISP-bound calls.

26 At this juncture, the law governing compensation for ISP-bound traffic remained unsettled. While the *WorldCom* court allowed the compensation scheme under the

²⁶ *Id.* ¶ 2.

²⁷ *Id.* ¶¶ 2-7.

²⁸ See n.6, *supra*.

²⁹ *Id.* ¶ 77.

³⁰ *WorldCom Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) (*WorldCom*).

ISP Remand Order to remain in place, the court had questioned the FCC's legal basis for asserting jurisdiction over this traffic. In addition, disputes remained over the scope of the ISP-bound calls subject to the FCC's order.

2. State Commission Determination on VNXX ISP-Bound Traffic

27 Subsequent to the *World Com* decision, but prior to any further FCC action on remand, this Commission was asked to resolve disputes between various telecommunications carriers concerning the proper compensation for a form of ISP-bound calling provided through use of VNXX service. In 2005, Pac-West and Level 3 initiated the enforcement cases, which were petitions for enforcement of their interconnection agreements with Qwest, alleging that Qwest owed them the ISP-bound traffic rate or reciprocal compensation for VNXX ISP-bound traffic. Qwest denied it had an obligation to pay reciprocal compensation for such VNXX traffic arguing this traffic was not exchanged within a local calling area as required by the *ISP Remand Order*. Qwest further contended that VNXX ISP-bound service was a misuse of numbering resources, and violated state law and the terms of the parties' interconnection agreements.³¹ In these enforcement cases, the Commission ruled that the *ISP Remand Order*'s interim compensation scheme for ISP-bound traffic applied to all traffic bound for an ISP, including VNXX ISP-bound traffic, regardless of where the traffic originated or terminated.³² Therefore, the Commission held that Qwest owed the CLECs compensation for termination of ISP-bound traffic from Qwest's customers.

3. Subsequent Federal Court Case Law Concerning VNXX ISP-bound Traffic

28 Following the Commission's orders in the Pac-West and Level 3 cases, various federal courts in the First, Second, and Ninth Circuits entered orders reaching a conclusion opposite to that reached by this Commission regarding the scope of calls

³¹ Qwest's Answer and Counterclaim, Docket UT-053036, ¶¶ 19-32, 57-66, June 16, 2005; see also Qwest's Answer and Counterclaim, Docket UT-053039, ¶¶ 22-44, 65-78, June 28, 2005.

³² *Pac-West Telecom, Inc. v. Qwest Corp.* Docket UT-053036, Order 05, Final Order Affirming and Clarifying Recommended Decision (Feb 10, 2006) (*Pac-West*); *Level 3 Communications, LLC v. Qwest Corp.* Docket UT-053039, Order 05, Order Accepting Interlocutory Review; Granting, in Part and Denying in Part, Level 3's Petition for Interlocutory Review (Feb. 10, 2006) (*Level 3*). See also *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc., Pursuant to 47 U.S.C. Section 252*, Docket UT-023043, Seventh Supplemental Order, Affirming Arbitrator's Report and Decision, (Feb. 28, 2003) ¶¶ 7-10 (*CenturyTel Level 3 Order*).

to which the FCC's interim compensation scheme applied.³³ These courts held that the *ISP Remand Order*'s rates applied only to ISP-bound calls that actually originate and terminate within a local calling area, although the resulting compensation varied depending on the terms of the interconnection agreements and state law and tariffs governing carriers' local calling areas.³⁴

- 29 The First Circuit concluded that the FCC's focus in the *ISP Remand Order* was compensation for "the delivery of calls from one LECs' end-user customer to an ISP in the same local calling area that is served by a competing LEC," and not for all ISP-bound calls.³⁵ It further determined that although the *ISP Remand Order* did not clearly address ISP-bound VNXX traffic, it did not preempt state commission authority to impose intrastate access charges for such traffic.³⁶
- 30 Likewise, the Second Circuit in *Global NAPs II* upheld a decision of the Vermont Public Service Board in which the Board-determined local calling areas establish whether a call is a toll or local, including ISP-bound calls. The court stated that "despite the monumental changes Congress had made in telecommunications law, the FCC early indicated that it intended to leave authority over defining local calling areas where it always had been – squarely within the jurisdiction of the state commissions."³⁷ Consistent with the First Circuit's decision in *Global Naps I*, the court determined that states are not preempted from applying access charges to interexchange ISP-bound traffic or from banning the use of VNXX arrangements.³⁸
- 31 Finally, in *Peevey*, the Ninth Circuit upheld the California Public Utilities Commission's decision to classify and determine compensation for VNXX traffic,

³³ See *Global NAPs, Inc. v. Verizon New England, Inc.*, et al., 444 F.3d 59 (1st Cir. 2006) (*Global NAPs I*); *Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91 (2nd Cir. 2006) (*Global NAPs II*); *Peevey*, 462 F.3d 1142 (9th Cir. 2006).

³⁴ See *Final VNXX Order*, ¶¶ 42-48.

³⁵ *Global NAPs I*, at 73-74, quoting *ISP Remand Order*, ¶ 13 (emphasis added).

³⁶ *Id.* at 75.

³⁷ *Global NAPs II*, at 97.

³⁸ *Id.* at 100-103. Finding support for its conclusion in the *ISP Remand Order*, the court noted that the FCC's order "expressly states that access services remain subject to FCC jurisdiction or, to the extent they are intrastate services, they remain subject to the jurisdiction of state commissions." *Id.* at 100.

finding it within the agency's authority over interexchange traffic under the Act and the FCC's *Local Competition Order*.³⁹

4. District Court Remand of Commission Enforcement Cases

32 In 2007, following this line of federal decisions, the U.S. District Court for Western Washington reversed this Commission's orders in the enforcement cases. The court held that the *ISP Remand Order* applied only to ISP-bound calls originating and terminating within a local calling area. The court therefore remanded the decisions to the Commission with instructions to:

reinterpret the *ISP-Remand Order* as applied to the parties' interconnection agreements, and classify the instant VNXX calls, for compensation purposes, as within or outside a local calling area, to be determined by the assigned telephone numbers, the physical routing points of the calls, or any other chosen method within the WUTC's discretion.⁴⁰

Thus, the court held that the Commission has authority to classify VNXX traffic, and if appropriate, to establish a reasonable compensation scheme for such traffic. No party sought review of this decision.

5. Commission VNXX Complaint Case

33 In July 2008, prior to addressing the District Court's remand in the *Qwest Order*,⁴¹ the Commission issued its *Final VNXX Order*, resolving Qwest's complaint against the CLECs' use of VNXX to provide ISP-bound service. The Commission found that VNXX service was lawful if accompanied by appropriate compensation provisions, and revisited its earlier conclusion that all ISP-bound calls were subject to the FCC's interim compensation scheme under the *ISP Remand Order*. Specifically, the Commission found that while some ISP-bound calls were interstate, others, including many VNXX calls, were intrastate interexchange calls. The Commission further found that:

³⁹ *Peevey*, 462 F.3d at 1146, quoting *Local Competition Order*, ¶ 1033: "[T]he Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic." See also *Id.* at 1157-58.

⁴⁰ *Id.* at 1177.

⁴¹ On February 15, 2008, the Commission stayed proceedings in the remanded Dockets UT-053036 and UT-053039 pending issuance of the *Final VNXX Order*. See *Pac-West*, Order 07 and *Level 3*, Order 07.

the *ISP Remand Order* did not address VNXX traffic, only the narrow issue of “whether reciprocal compensation obligations apply to the delivery of calls from one LEC’s end-user customer to an ISP in the same local calling area that is served by the competing LEC.”⁴²

34 The Commission concluded that VNXX services are interexchange in nature and not subject to Section 251(b)(5),⁴³ and clarified

...

that VNXX traffic does not originate and terminate within the same LCA [local calling area]. If it did, the CLECs would have no business rationale to establish VNXX arrangements, the traffic would fall within the *ISP Remand Order* compensation scheme, and this proceeding would be unnecessary. The classification of VNXX traffic as intrastate interexchange is consistent with state and federal law, is within the options suggested by the district court, and is clearly justified under our authority.⁴⁴

The Commission relied on recent federal court decisions that had

found that distinctions between traffic subject to section 251(b)(5) and that carved out under section 251(g) remain in force, that intrastate interexchange traffic is subject to carve out under section 251(g) and that states retain jurisdiction over intrastate interexchange traffic. Under this analysis, it is unquestionable that states retain authority under the Act and FCC orders to determine compensation for intrastate interexchange traffic.⁴⁵

6. The FCC’s *Mandamus Order*

35 Meanwhile, following the *WorldCom* decision in 2002 and frustrated by the FCC’s repeated failure to articulate the legal basis for its compensation scheme for ISP-bound traffic, Core Communications filed a petition for a writ of mandamus with the D.C. Circuit seeking an order requiring the FCC to justify its position. After initially denying the petition in 2005 “without prejudice,” an exasperated court in 2008 granted the petition and ordered the FCC to enter a final, appealable order by

⁴² *Final VNXX Order*, ¶ 113 (citation omitted).

⁴³ *Id.* ¶ 129.

⁴⁴ *Id.* ¶ 130.

⁴⁵ *Id.* ¶ 131.

November 5, 2008, and to explain the legal authority supporting its decision in the *ISP Remand Order*.⁴⁶

36 In response to the court's directive, the FCC issued its *Mandamus Order*⁴⁷ on November 5, 2008, reiterating its decision in the *ISP Remand Order* and concluding that the reciprocal compensation provisions of section 251(b)(5) of the Act cover all "telecommunications," including ISP-bound traffic, not just "local" traffic.⁴⁸ The FCC reasoned that the traffic encompassed by section 251(g) (exchange access traffic) is excluded from section 251(b)(5), but found, in agreement with the D.C. Circuit's *WorldCom* order, "that ISP-bound traffic did not fall within the section 251(g) carve out from section 251(b)(5) as there was no pre-Act obligation relating to intercarrier compensation for ISP-bound traffic."⁴⁹

37 It is critical to the issues in this proceeding to note that the *Mandamus Order*, released more than seven years following the effective date of the *ISP Remand Order*, did not alter the scope of that order. Rather, as explained below, the FCC merely revised and clarified the legal basis for its authority to establish rates for the narrow category of ISP-bound traffic that is served by two carriers exchanging traffic within a common local calling area. The FCC, in briefs filed with the D.C. Circuit on the petition for mandamus, and on appeal of the *Mandamus Order*, noted that the scope of the ISP-bound traffic to which the compensation scheme applies is limited to that within a local calling area.⁵⁰

⁴⁶ *In re Core Communications, Inc.*, 531 F.3d 849, 861-62 (D.C. Cir. 2008). The court expressed its displeasure in no uncertain terms, stating that "at the point, the FCC's delay in responding to our remand is egregious" (*Id.* at 850), and, in effect, giving the FCC one more chance. The court stated: "Having repeatedly, and mistakenly, put our faith in the Commission we will not do so again. If the FCC cannot, within six months, explain its legal authority for the interim rules, we can only presume that this is because there is in fact no such authority." *Id.* at 861.

⁴⁷ *Mandamus Order*, 24 FCC Rcd 6475 (2008).

⁴⁸ To reach this conclusion, the FCC asserted that the term "local" is not used in section 251(b)(5), nor defined in the Act. *Mandamus Order*, ¶¶ 7-9.

⁴⁹ *Id.* ¶ 16.

⁵⁰ Opposition of Federal Communications Commission to Petition for Writ of Mandamus at 26, *In re Core Communications, Inc.*, 531 F.3d 849 (D.C. Cir. Dec. 27, 2007) (No. 03-3674), attached as Tab 1 to Qwest's Supplemental Authority, June 3, 2009; see also Brief for Federal Communications Commission at 21, *Core Communications, Inc., v. FCC*, 592 F.3d 139, 144 (D.C. Cir. May 1, 2009) (Nos. 08-1365, et al.), attached as Tab 2 to Qwest's Supplemental Authority, June 3, 2009.

38 Once again, the FCC's decision was challenged in the D.C. Circuit. However, this time, the court upheld the FCC and its reasoning. In its *Core III* decision, the D.C. Circuit recognized the limited nature of dial-up internet traffic, finding:

[d]ial-up internet traffic is special because it involves interstate communications that are delivered through local calls; it thus simultaneously implicates the regimes of both § 201 and §§ 251-252. Neither regime is a subset of the other. They intersect, and dial-up internet traffic falls within the intersection.⁵¹

Finding the Act's scope covered the FCC's interim compensation scheme, the court concluded that the FCC possessed the authority under Sections 201 and 251(i) of the Act to set rates for such ISP-bound traffic.

39 Shortly after *Core III*, the First Circuit Court of Appeals reached a similar conclusion and affirmed the narrow scope of FCC orders relating to ISP-bound traffic, concluding that the FCC's *Mandamus Order* "simply clarified the legal basis for the authority the FCC had asserted in earlier orders to regulate local ISP traffic and prevent regulatory arbitrage. ... the issues the FCC addressed in the 2008 order did not go to regulation of intercarrier compensation for interexchange ISP traffic."⁵² The CLECs argue this very issue in this proceeding.

B. Motions for Summary Determination

40 The parties filed motions for summary determination requesting the Commission to modify its earlier decision regarding VNXX traffic consistent with recent FCC and court decisions addressing the issue.

41 Under the Commission's procedural rules, the Commission may grant summary determination where the pleadings, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.⁵³ Summary determination is

⁵¹ *Core III*, 592 F.3d at 144.

⁵² *Global NAPs, Inc. v. Verizon New England, Inc., et al.*, 603 F.3d 71, 82 (1st Cir. 2010) (*Global NAPs V*).

⁵³ See WAC 480-07-380(2)(a).

appropriate if, based on all the evidence, there are no issues of material fact and reasonable persons could reach but one conclusion.⁵⁴

- 42 The Commission must consider the facts in the light most favorable to the non-moving party.⁵⁵ Once the moving party has demonstrated that there are no material facts in dispute, the burden shifts to the non-moving party to set forth specific facts sufficient to rebut the moving party's contentions.⁵⁶ If the non-moving party fails to set forth any such facts, summary determination is proper.⁵⁷
- 43 In considering the parties' motions for summary determination, the Commission must also respond to the District Court's instructions in the remand order to: 1) reinterpret the *ISP Remand Order* as it applies to the parties' interconnection agreements; and 2) classify VNXX ISP-bound calls as within or outside a local calling area. Specifically, we must apply the recent decisions on VNXX traffic, review our authority in light of these decisions, and determine the impact of our conclusions on the classification of VNXX ISP-bound calls and the appropriate compensation for such calls. The Commission must then determine whether it is appropriate to grant summary determination to any party.
- 44 The CLECs assert that the material facts necessary to address the court's directions on remand are not in dispute. In contrast, Qwest argues that the CLECs have not presented evidence that the traffic in dispute originated and terminated in the same local calling area, or whether the CLECs actually terminated the disputed traffic.⁵⁸ While Qwest presents an argument based on affidavits about the amount of VNXX traffic and the compensation owed to Qwest through refunds based on its estimates of disputed VNXX traffic, the parties agree that these factual questions can be addressed through a separate evidentiary proceeding after the Commission resolves the legal issues on remand.⁵⁹ Level 3 asserts, in response to Qwest's motion, that material facts

⁵⁴ *Vallandingham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

⁵⁵ *Homestreet, Inc. v. State Dept. of Revenue*, 139 Wash. App. 827, 162 P.3d 458, 464 (2007).

⁵⁶ *Atherton Condo. Apartment-Owner Ass'n Bd. Of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 512, 799 P.2d 250 (1990)

⁵⁷ *Atherton*, 115 Wn.2d at 516.

⁵⁸ Qwest Response to Pac-West Motion, ¶ 6; Qwest Response to Level 3 Motion, ¶ 6.

⁵⁹ Pac-West Motion, ¶¶ 28-31; Level 3 Motion, ¶ 1; Qwest Motion, ¶ 3; Level 3 Response to Qwest's Motion, ¶¶ 54-61.

that support Qwest's theory about compensation are in dispute, but does not clearly identify the facts in dispute.⁶⁰

45 The issues on remand are issues of law and fact that may be resolved on motions for summary determination and the evidence the parties have submitted. The District Court asks us to interpret the *ISP Remand Order* (a legal decision addressed in numerous federal court decisions), the parties' interconnection agreements (the relevant parts of which the parties have submitted in this case), and whether VNXX calls fall within or outside of a local calling area (a determination that depends upon state law, rules, and the parties' tariffs and interconnection agreements). For the reasons discussed below, we deny the CLECs' motions for summary determination and grant Qwest's motions for summary determination on the issues of law, including the interpretation of the *ISP Remand Order*, the classification of VNXX traffic, and the interpretation of the parties' interconnection agreements. We deny Qwest's motion as it relates to the amount and nature of the specific traffic in question, and defer consideration of these issues to a separate evidentiary proceeding.⁶¹

C. Discussion of Issues

1. What is the Applicable Law?

46 Qwest argues that the District Court's decision is the law of the case and cannot be changed or relitigated.⁶² In other words, the Commission is bound by the District Court's conclusion that the *ISP Remand Order* applies federal rates only to ISP-bound traffic that is within a local calling area. Qwest also argues that Washington's rules of contract interpretation require reference to the law at the time the contract was executed.⁶³

47 Qwest contends that even if the FCC's *Mandamus Order* is interpreted as the law applicable to this case, it must be interpreted to retain the same scope as the *ISP*

⁶⁰ Level 3 Response to Qwest's Motion, ¶ 9.

⁶¹ We encourage the parties to file with the Commission all necessary data, analysis and traffic studies to allow the Commission to quickly enter a decision on these factual issues. As the Commission's determination is retroactive, the parties must also file the appropriate evidence of the start and end date for the Commission to determine compensation.

⁶² Qwest Response to Level 3 Motion, ¶ 14, citing *In re Wiersma*, 483 F.3d 933, 941 (9th Cir. 2007).

⁶³ Qwest Memorandum in Support of Motion, ¶ 46, citing *GTE v. Bothell*, 105 Wn.2d 579, 716 P.2d 879 (1986).

Remand Order when determining the appropriate basis for compensation of ISP-bound traffic, i.e., that the order applies only to ISP-bound traffic within a local calling area. Qwest claims that, even if the Commission determines that the *Mandamus Order* changes the scope of the ISP-bound traffic to which the *ISP Remand Order* applies, the Commission cannot alter the District Court's interpretation of the *ISP Remand Order*.

48 Level 3 and Pac-West disagree. They argue that the *Mandamus Order* applies in this case, rendering moot the District Court's directions on remand.⁶⁴ The CLECs rely on the Ninth Circuit's *Pacific Bell* case that held that state contract laws would apply when reviewing decisions on the arbitration or formation of interconnection agreements. Applicable state law would include "all valid implementing regulations in effect at the time we review district court and state regulatory commission decisions, including regulations and rules that took effect after the local regulatory commission rendered its decision."⁶⁵

49 Qwest responds that the *Pacific Bell* court was only reviewing the formation of interconnection agreements, not interpreting them for purposes of enforcement as the Commission is doing in this case.

50 This distinction is without merit. Interconnection agreements are contracts formed within the jurisdictions to which they apply and state commissions have authority under the Act to enforce provisions of agreements they approve.⁶⁶ Further, interconnection agreements cover all aspects of the relationship between the contracting parties. Contract formation is but one aspect of the relationship represented by the agreement, and is generally limited to the narrow question of whether a contract between the parties exists under law. The *Pacific Bell* court clearly recognized a state commission's broad authority under section 252(b) of the Act to resolve interconnection disputes between ILECs and CLECs and did not limit its decision only to the formation of interconnection agreements. It would make no sense to limit a commission's jurisdiction to that of contract formation, and strip it of its authority to interpret key contract terms or enforce the obligations set forth in the

⁶⁴ Pac-West Motion, ¶ 9; Level 3 Motion, ¶ 33.

⁶⁵ Level 3 Motion, ¶ 26, n.43, quoting *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1130-1131, n.14 (9th Cir. 2003).

⁶⁶ *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997), *aff'd in part, rev'd in part on other grounds, AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366 (1999).

agreement. Following Qwest's argument to its logical conclusion would lead to such a result.

- 51 Further, Qwest's argument that the law of the case doctrine governs the Commission's review also must fail. To make this argument, Qwest ignores contrary authority finding that the law of the case doctrine may not apply when changes in law have occurred.⁶⁷ The issues in this case involve the interpretation of the *ISP Remand Order*, which in turn interprets the Act. The *ISP Remand Order* itself was subject to remand, requiring us to consider the FCC's *Mandamus Order* and the D.C. Circuit's decision upholding the order, and whether these decisions result in a change in law.
- 52 Finally, Qwest's argument regarding state contract law ignores Washington cases that give courts broad latitude when interpreting contract terms in order to ascertain their meaning.⁶⁸ In *Berg*, the court found that even a term that seems unambiguous on its face is open to interpretation, and gave the court broad latitude to draw on extrinsic information in interpreting a contract.⁶⁹ As the Act authorizes the Commission to arbitrate contract disputes between telecommunication companies in Washington, we draw upon existing state law to interpret the contracts the parties have brought to us for resolution. Qwest cannot now argue that Washington contract law or a relevant subset of it is beyond our purview.
- 53 In conclusion, we agree with the CLECs that both the FCC's *Mandamus Order* as well as the *ISP Remand Order* are applicable to our decision here. In the *Mandamus Order*, the FCC finally provided the D.C. Circuit an explanation of its legal authority to issue the pricing rules contained in the *ISP Remand Order*,⁷⁰ a decision the D.C. Circuit upheld on appeal. The *Pacific Bell* case provides persuasive authority that the Commission should apply the current law in effect when interpreting the parties' intention as to the application of the *ISP Remand Order*, which has been specifically incorporated into the parties' interconnection agreements. However, as discussed further below, neither the *Mandamus Order* nor the *Core III* decision upholding it change the relatively narrow scope of traffic addressed by the *ISP Remand Order* – the “subset of ISP-bound traffic, specifically, [dial up] ISP-bound traffic within a

⁶⁷ See *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997).

⁶⁸ See *Berg v. Hudesman*, 115 Wn.2d 660, 801 P.2d 222 (1990).

⁶⁹ *Berg*, 115 Wn.2d at 666-69.

⁷⁰ *Mandamus Order*, ¶ 5, citing *In re Core Communications, Inc.*, 531 F.3d 849, 861-62 (D.C. Cir. 2008).

local calling area.”⁷¹ Contrary to the CLECs’ arguments, the District Court’s decision is not moot.

2. What is the Correct Interpretation of the *ISP Remand Order* in Light of the *Mandamus Order*?

- 54 The Commission must answer two questions of law in interpreting the *ISP Remand Order* and the subsequent *Mandamus Order*: first, whether the scope of the *Mandamus Order*, like the *ISP Remand Order*, is limited to ISP-bound calls within a local calling area; and second, whether section 251(g) excludes *all* ISP-bound traffic from reciprocal compensation obligations under section 251(b)(5). Consistent with their positions throughout these proceedings, the CLECs and Qwest are diametrically opposed on these issues.
- 55 The CLECs contend that the FCC intended its *Mandamus Order* to apply to all ISP-bound traffic, not simply ISP-bound traffic within a local calling area. They rely on the FCC’s finding that the reciprocal compensation provisions of section 251(b)(5) cover all “telecommunications,” not just local traffic, because the definition of “telecommunications” does not include the term “local.”⁷² Further, the CLECs argue that under the analysis in *WorldCom* and the *Mandamus Order*, no ISP-bound traffic may be carved out from section 251(b)(5) by applying section 251(g). The CLECs assert that, under this analysis, section 251(b)(5) traffic includes *all* ISP-bound traffic and such traffic would be subject to reciprocal compensation. They cite to the FCC’s statements, which are contrary to the *ISP Remand Order*, that the access traffic encompassed by section 251(g) of the Act could not have included ISP-bound traffic as there was no pre-Act ISP-bound traffic.⁷³ Finally, Pac-West points out that there was no intercarrier compensation arrangement for VNXX ISP-bound traffic prior to the Act.⁷⁴
- 56 Qwest argues that the *Mandamus Order* does not explicitly reject applying the *ISP Remand Order*’s rates to the narrower scope of ISP-bound calls. Additionally, Qwest contends that neither the *ISP Remand Order* nor the *Mandamus Order* specifically mention VNXX ISP-bound calling. Qwest further points out that even though the

⁷¹ *Qwest*, 484 F. Supp. 2d at 1171.

⁷² Pac-West Motion, ¶ 10; Level 3 Motion, ¶¶ 2, 27-31.

⁷³ Pac-West Motion, ¶¶ 10-15; Level 3 Motion, ¶¶ 44-52.

⁷⁴ Pac-West Motion, ¶¶ 11-13.

FCC in the *Mandamus Order* no longer classifies ISP-bound calls as carved out by section 251(g), the order made clear that the access charge system for interexchange calls remains in place under the Act. Qwest contends that the FCC's end-to-end analysis for ISP-bound calls within a local calling area would also logically apply to all ISP-bound calls. Thus, Qwest asserts that all ISP-bound calls are interstate in nature. However, Qwest argues that calling arrangements like VNXX existed prior to the Act, and were subject to federal and state access rules, exempting certain calls from interstate access charges and allowing states to determine the compensation for such calls.⁷⁵ Thus, Qwest claims that VNXX ISP-bound calls should be classified as either intrastate or interstate interexchange calls, subject to the relevant access charges. Qwest says that when the CLECs in this case provide VNXX ISP-bound service they are, in reality, interexchange service providers and that the VNXX calls are subject to interexchange access charges under section 251(g).

57 As to the first question of law, we find that the *Mandamus Order* has no effect on the District Court's interpretation of the scope of the *ISP Remand Order*. Therefore, we follow the court's analysis and decision, which held that "the *ISP Remand Order* addressed the compensation structure of a subset of ISP-bound traffic, specifically, ISP-bound traffic within a local calling area."⁷⁶ By this, the court referred, in part, to the FCC's discussion of arbitrage by companies seeking to maximize revenue through reciprocal compensation for traffic in local calling areas. We are persuaded that the *Mandamus Order* only clarified the legal rationale supporting the *ISP Remand Order's* compensation scheme, which was later affirmed in the D.C. Circuit and First Circuit. It did not create a new regulatory scheme by expanding the scope of traffic to which the FCC's rates established in the *ISP Remand Order* apply.⁷⁷

58 Determining the impact of the *Mandamus Order* on the FCC's authority to regulate ISP-bound VNXX calls is less clear. In the order, the FCC clarified its earlier legal analysis and found that section 251(g) did not exclude ISP-bound calls from section 251(b)(5) compensation. Without modifying its conclusion that ISP-bound traffic is interstate in nature, it asserted concurrent jurisdiction under sections 201 and 251(b)(5) as the foundation for establishing its interim compensation scheme for ISP-bound traffic.

⁷⁵ Qwest Memorandum, ¶¶ 68-72.

⁷⁶ *Qwest*, 484 F. Supp. 2d at 1171.

⁷⁷ Qwest Supplemental Initial Brief, ¶ 20, citing *Global NAPs V* at 82.

59 The CLECs assert that the FCC's revised legal analysis effectively makes *all* ISP-bound traffic subject to the rates in the *ISP Remand Order*. They argue that the FCC intended to include all ISP-bound traffic in its interim compensation scheme because it included that "the transport and termination of all telecommunications exchanged with LECs is subject to reciprocal compensation."⁷⁸ Under this analysis, the CLECs argue that traffic bound for ISPs is section 251(b)(5) traffic subject to reciprocal compensation. The administrative simplicity of the CLECs' position is superficially attractive because it would create a single compensation rate that would apply to all ISP-bound calls, thereby eliminating any billing distinction between local, interexchange and interstate calls. In contrast, Qwest's position would result in more than one compensation scheme for different types of ISP-bound traffic. For example, the *ISP Remand Order* rate would apply to ISP-bound calls within a local calling area, intrastate toll or access charge rates might apply to interexchange ISP-bound calls within a state, and interstate access rates might apply to interstate ISP-bound calls. Nevertheless, while Qwest's position may appear to be counterintuitive⁷⁹ and more complex to administer, we conclude this result to be correct from both a legal and policy point of view.

60 Therefore, we join other state commissions and federal courts in concluding that the FCC's use of the term "ISP-bound traffic" in the *Mandamus Order* did not mean "all" ISP-bound traffic. Rather, we believe the FCC intended to limit the order's scope to that of the *ISP Remand Order*: those calls terminating within a local calling area.⁸⁰ Our assessment is bolstered by the First Circuit Court of Appeals which reached this same conclusion in the most recent decision involving yet another dispute between Global NAPS, Inc., and Verizon New England, Inc., over the scope of the *ISP Remand Order* and interpretation of the parties' interconnection agreement.⁸¹ As with the First Circuit in *Global Naps V*, we see nothing in the *Mandamus Order* that

⁷⁸ Pac-West Supplemental Initial Brief, ¶ 10, quoting *Mandamus Order*, ¶ 15; see also Level 3 Supplemental Initial Brief, ¶ 9.

⁷⁹ The Commission recognized this in its *Final VNXX Order*, referring to Lewis Carroll's story of *Alice's Adventures in Wonderland*. See *Final VNXX Order*, ¶ 15, n.11 and ¶ 28, n.25.

⁸⁰ Thus, other ISP-bound calls might fall within the section 251(g) exclusion, although ISP-bound calls within a local calling area would not.

⁸¹ *Global NAPS V*, 603 F.3d at 82 ("The 2008 Second Remand Order simply clarified the legal basis for the authority the FCC had asserted in earlier orders to regulate local ISP traffic and prevent regulatory arbitrage. [T]he issue the FCC addressed in the 2008 order did not go to regulation of intercarrier compensation for interexchange ISP traffic.")

divests, in whole or part, the authority we retain to determine the scope of local and interexchange calling areas.⁸² Our previous order determined that ISP-bound traffic using VNXX services is not local traffic and should not be included in the scope of traffic subject to the FCC's new compensation scheme.⁸³ We see no legal requirement to abandon our classification of VNXX traffic. We now turn to the policy arguments raised by the issue.

61 As we discussed in the *Final VNXX Order*, ceding to the CLECs' position might have the effect of eroding the careful distinction that exists between local and interexchange traffic. Classifying VNXX calls as interstate could undermine the authority of states to regulate intrastate interexchange telecommunications traffic and the associated revenues. For example, if all ISP-bound calls were classified as interstate traffic subject to the FCC's rates, we could unreasonably jeopardize the existing access charge system, on which telecommunications' companies rely to cover the costs they incur to support the services afforded the customer of another company. The small and rural local exchange companies rely heavily on these access charges to provide lower cost service to their customers and to comply with federal and state laws that compel certain benefits to rural customers. Without this support, companies serving rural populations would suffer from undercapitalization or be forced to extract lost revenue from their customers – a result contrary to the federal laws creating the rural support system. We do not believe such a far-reaching result was intended by either the FCC or any court that has taken up the VNXX question following the *ISP Remand Order*.

62 We also note the interplay and relevance of certain terms of the parties' interconnection agreements. The terms "local" and "interexchange" are identified and used within the agreements to govern the transport and termination of telecommunications traffic between respective networks.⁸⁴ At the time these terms

⁸² See *Global NAPs V*, at 82-83.

⁸³ See *Final VNXX Order*, ¶¶ 130-132.

⁸⁴ See March 16, 2001, Interconnection Agreement between Qwest Corporation and Pac-West, § 4, Exh. D to Smith Affidavit in Support of Qwest Memorandum; see also December 13, 2002, Interconnection Agreement between Qwest Corporation and Level 3, § 4, Exh. C to Smith Affidavit in Support of Qwest Memorandum; see also May 24, 2002, ISP Bound Traffic Amendment to Interconnection Agreement between Qwest Corporation and Pac-West, Exh. D to Brotherson Affidavit in Support of Qwest Memorandum; see also October 2, 2002, ISP Bound Traffic Amendment to Interconnection Agreement between Qwest Corporation and Level 3, Exh. E to Brotherson Affidavit in Support of Qwest Memorandum.

were incorporated into the agreements, the parties must have intended some meaning to the terms as they serve as the basis for determining whether traffic is or is not subject to intrastate access charges. If the CLECs' position is that the *Mandamus Order* altered the scope of the traffic covered by the FCC's intercarrier compensation scheme in the *ISP Remand Order*, then the parties' interests would be served by amending their agreements to effect this result.⁸⁵ It is notable that none of the parties, particularly the CLECs, sought to invoke the change of law provisions of their respective interconnection agreements with Qwest to expand the scope of traffic subject to the ISP-bound compensation scheme in the manner asserted by the CLECs.

3. What is the Correct Classification of ISP-bound VNXX Calls?

63 One of the District Court's directions on remand was for the Commission to "classify the instant VNXX calls, for compensation purposes, as within or outside a local calling area, to be determined by the assigned telephone numbers, the physical routing points of the calls, or any other chosen method within the WUTC's discretion."⁸⁶ We address the court's classification directive below.

64 Classifying VNXX calls involves not only determining whether the calls are within or outside a local calling area based on state laws and rules, but also how the calls fit within the compensation scheme of the Act, e.g., section 251(b)(5) or section 251(g).

65 In the *Final VNXX Order*, the Commission determined that VNXX calls, including ISP-bound VNXX calls, should be classified as interexchange calls (*i.e.*, not local) and that those calls that terminated inside the state of Washington were intrastate interexchange calls, subject to the Commission's jurisdiction to determine compensation.⁸⁷ In reaching this conclusion, the Commission relied in part on the District Court's analysis of the *ISP Remand Order*.

⁸⁵ The parties' agreements include "change of law" provisions that would allow such an amendment. See May 24, 2002, ISP Bound Traffic Amendment to Interconnection Agreement between Qwest Corporation and Pac-West, § 6, Exh. D to Brotherson Affidavit in Support of Qwest Memorandum; see also October 2, 2002, ISP Bound Traffic Amendment to Interconnection Agreement between Qwest Corporation and Level 3, Exh. E to Brotherson Affidavit in Support of Qwest Memorandum.

⁸⁶ *Qwest*, 484 F. Supp. 2d at 1177.

⁸⁷ *Final VNXX Order*, ¶¶ 130-34 ("Although the FCC chose to remove references to 'local' traffic from its rules, it is abundantly clear that it did not intend to eliminate state control over intrastate interexchange traffic or the historically geographic basis for classifying traffic." *Id.* ¶ 132.)

- 66 The CLECs argue that the FCC's *Mandamus Order* rejected a geographic analysis of call classification, no longer relying on the term "local," and concluded that such traffic is only section 251(b)(5) or section 251(g) traffic, not "interexchange" or "local." The CLECs argue that the Commission should not rely on its decision of call classification in the *Final VNXX Order*, as the order does not consider the FCC's most recent analysis in the *Mandamus Order*.
- 67 Qwest contests whether the *Mandamus Order* precludes the use of geography for call classification and argues that nothing in the *Mandamus Order* undercuts or preempts a state's authority to classify calls based on state law and tariff. Qwest also rejects the CLECs' contentions that the terms interexchange and local are no longer valid in determining call classification. Qwest argues that the classification of VNXX traffic, including ISP-bound VNXX traffic, in the *Final VNXX Order* is correct and that the Commission should continue to rely on that analysis in this proceeding.
- 68 Both parties argue that the Commission has the discretion and flexibility under the remand decision to classify calls.

a. How should the Commission classify VNXX ISP-bound calls?

- 69 Under the District Court's direction, the Commission may use the assigned telephone numbers, the physical routing points of the calls, or any other chosen method *within the Commission's discretion* to determine whether VNXX calls are within or outside a local calling area.⁸⁸ The court recognized that state commissions have authority to designate and control local calling area boundaries that differentiate "local" calls from "interexchange" calls. The local call boundary decisions made by state commissions determine the appropriate intercarrier compensation to which a carrier is entitled.
- 70 The CLECs argue that the Commission may use the assigned numbers, consistent with their argument that the traffic is "locally-dialed," to determine whether VNXX calls are local, and that the Commission is not restricted to a geographic analysis. Further, the CLECs argue that the FCC rejected a geographic analysis in the *Mandamus Order*. In contrast, Qwest argues that the Commission should use geographic or physical routing points to determine whether VNXX calls originate outside a local calling area.⁸⁹ Here, Qwest follows the analysis of our *Final VNXX*

⁸⁸ *Qwest*, 484 F. Supp. 2d at 1177.

⁸⁹ Qwest Memorandum, ¶¶ 45-53.

Order and identifies provisions in state statute and rule, its tariffs, the CLECs' tariffs and the parties' interconnection agreements to support its position. Qwest argues that the Commission's legal findings in the *Final VNXX Order* on call classification are still applicable.⁹⁰ Qwest also asserts that, to the extent the Commission finds that the *Mandamus Order* rejects the concept of "local" traffic, the order is a change of law under the parties' interconnection agreements: the agreements include the term "local" as synonymous with reciprocal compensation under section 251(b)(5). We conclude that the *Mandamus Order* has not affected our jurisdiction to classify intrastate calls.

- 71 Neither the *ISP Remand Order* nor the *Mandamus Order* eliminated the distinction between local and interexchange calls. Rather, those orders found that, even though ISP-bound calls within a local calling area fell under the reciprocal compensation provisions of section 251(b)(5), the calls were interstate calls under an end-to-end analysis. Because those ISP-bound calls were interstate in nature, the FCC had the authority to set the rates for such calls under Section 201.
- 72 Our *Final VNXX Order* properly classified VNXX calls under our jurisdiction, and the FCC's *Mandamus Order* does not dictate a change from our earlier decision. In the *Final VNXX Order*, we found that VNXX calls were not local but interexchange in nature. If these calls were terminated inside the state of Washington, then they were subject to the Commission's jurisdiction and properly classified as intrastate interexchange calls. Nothing in the *ISP Remand Order* or the *Mandamus Order* limits our authority to classify intrastate VNXX traffic. As to our classification analysis in the *Final VNXX Order*, we relied on state law, the applicable rules, Qwest's governing tariff and the parties' interconnection agreements to reach this conclusion.⁹¹ We repeat this analysis briefly here.
- 73 State law distinguishes local and interexchange traffic based on the geographic endpoints of the call. State statutes authorize the Commission "to prescribe exchange area boundaries and/or territorial boundaries for telecommunications companies."⁹² This allows the Commission to "define the geographical limits of a company's obligation to provide service on demand, and to delineate boundaries between local

⁹⁰ *Id.* ¶¶ 54-58.

⁹¹ *Final VNXX Order*, ¶ 148.

⁹² RCW 80.36.230.

and long distance calling.”⁹³ As we noted in the *Final VNXX Order*, “[o]ur rules define a local calling area as ‘one or more rate centers within which a customer can place calls without incurring long-distance (toll) charges’.”⁹⁴ The geographic areas that establish the local calling areas and distinguish between local and long-distance calling are defined in exchange maps in the Commission-approved tariffs of local exchange companies such as Qwest.⁹⁵ Importantly, the CLECs’ interconnection agreements with Qwest have adopted its same local calling area.⁹⁶

74 Neither the *ISP Remand Order* nor the *Mandamus Order* eliminated the distinction between local and interexchange calls. Rather those orders found that, even though ISP-bound calls within a local calling area fell under the reciprocal compensation provisions of section 251(b)(5), the calls were interstate calls under an end-to-end analysis. Because those ISP-bound calls were interstate in nature, the FCC had the authority to set the rates for such calls under section 201. We find nothing in the *ISP Remand Order* or the *Mandamus Order* that affects our authority to classify intrastate VNXX traffic.

75 The CLECs argue that in our *Final VNXX Order* we erred in our call classification analysis by using criteria other than the number dialed. They assert that “locally-dialed” calls (*i.e.* calls with local phone numbers) are local calls for the purpose of determining appropriate compensation for VNXX ISP-bound traffic, without regard to the geographic location of the called number. We disagree.

76 The CLECs VNXX service is based upon network arrangements or telephone number resources that create the illusion that calls to their ISP customers are local. In fact, terminating these calls may involve numerous switching and transport facilities that would not be necessary to terminate a call within the boundaries of the originating caller’s local calling area (*i.e.*, geographically local).⁹⁷ Under the CLEC’s analysis, these additional costs would be borne by the terminating company and avoided by the CLECs (originating company). For example, carriers could conceivably locate their

⁹³ *In re Electric Lightwave*, 123 Wn.2d 530, 537, 869 P.2d 1045 (1994).

⁹⁴ *Final VNXX Order*, ¶ 148, quoting WAC 480-120-021.

⁹⁵ *Id.*; see also Qwest Memorandum, ¶¶ 46-49.

⁹⁶ *Final VNXX Order*, ¶ 148; see also Qwest Memorandum, ¶ 52; see also Smith Affidavit, Exh. C and D.

⁹⁷ We note that the transport capacity requirements likely exceed that of ordinary calls because of the length of time ISP-bound calls are connected to the ISP server.

ISP modems virtually anywhere, with no actual physical presence or customers within a local exchange, and expect Qwest (or any other facilities-based carrier) to both transport VNXX calls to them and pay them the ISP-bound rate set forth in the *ISP Remand Order*. We find it contrary to public policy to allow such regulatory gamesmanship to occur given the importance of intercarrier compensation revenues, which are used to maintain a robust interconnected telecommunications network and to support important statutory policy goals such as universal service.

77 Furthermore, the rules for classifying calls as local or interexchange in Washington have been clearly delineated and understood by the parties. When the CLEC's adopted Qwest's local calling areas by and through their interconnection agreements, we have to believe that they understood the financial implications of their actions. No matter what innovative network or numbering arrangements have been made to facilitate ISP-bound traffic, calls are either local as defined by our rules or they are not. If they terminate outside the callers local exchange, we treat them as interexchange in nature and require compensation as such. This is the import of our *Final VNXX Order* and we believe our analysis then and now to be correct. The CLECs should bear the cost of using Qwest's network to serve their customers. This is a fundamental principle of intercarrier compensation that is reflected in interconnection agreements between these parties and those of all other companies within our jurisdiction.

b. Is the Commission's *Final VNXX Order Res Judicata* in this Proceeding?

78 The Commission recognized in its *Final VNXX Order* that "principles of *res judicata* may apply to narrow the issues in the dispute in the remand proceedings."⁹⁸ Qwest relies on this statement and the Washington case on the doctrine of *res judicata*, *Rains v. State*,⁹⁹ to argue that the principles of *res judicata* require the Commission to apply its findings from the *Final VNXX Order* in this proceeding. Level 3 argues against application of *res judicata*.

⁹⁸ *Final VNXX Order*, ¶ 24.

⁹⁹ *Rains v. State*, 100 Wn.2d 660, 674 P.2d 165 (1983).

79 In *Rains*, the Washington supreme court held:

Res judicata occurs when a prior judgment has a concurrence of identity in four respects with a subsequent action. There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made.¹⁰⁰

Whether there is identity of a cause of action depends on:

(1)[W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.¹⁰¹

80 Qwest asserts that the doctrine of *res judicata* applies in this proceeding and that all elements of the *Rains* test are met.¹⁰² Qwest argues that the subject matter of the current case and the VNXX complaint proceeding are identical – the classification of VNXX ISP-bound calls and the scope of the *ISP Remand Order*.¹⁰³ Qwest asserts that the causes of action were the same, as they arose out of the same nucleus of facts and involve substantially the same evidence,¹⁰⁴ that the parties are the same in the cases,¹⁰⁵ and that the quality of the parties is the same, in that they were all able to defend their legal and factual positions in the cases.¹⁰⁶

81 Level 3 asserts that the doctrine of *res judicata* is not applied to state administrative decisions with the same rigidity as a court decision and that a court must apply the

¹⁰⁰ *Rains*, 100 Wn.2d at 663, citing *Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 558 P.2d 725 (1978).

¹⁰¹ *Id.* at 663-64, quoting *Constantini v. Tran World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982), cert. denied, 103 S. Ct. 570 (1982), quoting *Harris v. Jacobs*, 621 F.2d 341, 343 (9th Cir. 1980).

¹⁰² Qwest Memorandum, ¶¶ 63-64.

¹⁰³ *Id.* ¶¶ 14-19, 64; Qwest Supplemental Initial Brief, n.2.

¹⁰⁴ Qwest Memorandum, ¶ 64.

¹⁰⁵ *Id.* ¶¶ 43, 64.

¹⁰⁶ *Id.* ¶ 64.

law in effect at the time it reviews a state decision.¹⁰⁷ On this basis, Level 3 asserts the Commission cannot rely on the *Final VNXX Order*, and must reevaluate its findings in light of the *Mandamus Order*.¹⁰⁸ Further, Level 3 disputes that all elements in *Rains* are met, arguing that there is a lack of identity of cause of action. Level 3 claims that the causes of action in this proceeding and VNXX complaint did not involve the same nucleus of facts or the same evidence.¹⁰⁹ Specifically, Level 3 asserts the Commission did not consolidate the cases following the remand, as it would have required reopening the record to provide an opportunity to present additional evidence.¹¹⁰ Level 3 also states that the *Final VNXX Order* acknowledged that it was not interpreting Pac-West's and Level 3's interconnection agreements in the proceeding.¹¹¹ Finally, Level 3 claims that it did not have the opportunity in the VNXX complaint proceeding to present evidence on the location of its modems.¹¹²

82 Pac-West does not address Qwest's *res judicata* argument. However, Pac-West asserts that the *Final VNXX Order* does not govern compensation for VNXX traffic under the parties' existing interconnection agreement, at least with respect to VNXX traffic that is not ISP-bound traffic, as the *Final VNXX Order* constitutes a change in law and cannot be applied retroactively.¹¹³

83 We decline to dismiss this case on the basis of *res judicata* for three reasons. First, *res judicata* usually is applied to prevent a litigant from filing a new case. In this instance, we are responding to a district court order on remand rather than addressing a new lawsuit filed before the Commission. Further, Level 3 raises appropriate concerns about the identity of the cause of action in these cases and the VNXX complaint, given the effect of the *Mandamus Order*.

84 Second, we concur with Level 3 that a court must exercise care in whether to give an administrative decision *res judicata* effect. Some federal courts have found the

¹⁰⁷ Level 3 Opposition, ¶ 49, quoting *U.S. v. Lasky*, 600 F.2d 765, 768 (9th Cir. 1979), citing *American Heritage Life Insurance Co. v. Heritage Life Insurance Co.*, 494 F.2d 3, 10 (5th Cir. 1974).

¹⁰⁸ *Id.* ¶¶ 9, 49, 52; Level 3 Supplemental Reply Brief, ¶¶ 10, 13-16.

¹⁰⁹ Level 3 Opposition, ¶ 51.

¹¹⁰ *Id.*, quoting Docket UT-063038, Order 09, at ¶¶ 18-19, 22.

¹¹¹ *Id.* ¶ 51.

¹¹² *Id.*

¹¹³ Pac-West Response, ¶ 19.

application of the doctrine to administrative cases less useful in preventing relitigation of issues, and note that in reviewing cases *de novo*, as in this matter, the court will usually give weight to the administrative decision maker, given the agency's expertise in a particular area.¹¹⁴

85 Finally, applying the doctrine of *res judicata* in these enforcement cases likely would result in a remand from the District Court in the VNXX complaint case, and we would be back to square one evaluating the impact of the FCC's *Mandamus Order* on our jurisdiction. That would result in an unnecessary procedural loop that would serve no purpose other than to further burden the court and the Commission.

86 In any event, we find that we reach the same decision on call classification as in the *Final VNXX Order* regardless of whether we apply the doctrine in these proceedings. Our analysis of call classification is determined by state law, and the parties' tariffs and agreements, which supports our decision in the *Final VNXX Order* and in this order.

4. How Should the Commission Interpret the Terms of the Parties' Interconnection Agreements?

87 While we conclude that the *Mandamus Order* does not affect our jurisdiction over compensation for intrastate VNXX traffic, we must address here the parties' assertions regarding the impact of the *Mandamus Order* on their interconnection agreements. The parties' arguments stem from the change of law provisions in their interconnection agreements and failure to exercise these provisions in the face of a changing regulatory environment.

88 In the alternative to its primary arguments regarding the effect of the *Mandamus Order*,¹¹⁵ Qwest contends that even if the FCC intended in the order that all ISP-bound traffic must be compensated at FCC rates, any change affecting the parties would have to follow the process set forth in their interconnection agreements. Qwest points to the agreements' change of law provisions, which require a written amendment to incorporate any changes of law.

¹¹⁴ See *American Heritage Life Insurance Co. v. Heritage Life Insurance Co.*, 494 F.2d 3, 10 (5th Cir. 1974); *United States v. Smith*, 482 F.2d 1120, 1123 (8th Cir. 1973).

¹¹⁵ See ¶¶ 46-47, 67, *supra*.

89 The CLECs claim that the parties' interconnection agreements specifically include terms that dictate compensation for ISP-bound traffic according to the terms of the *ISP Remand Order*.¹¹⁶ Alternatively, the CLECs claim that, under the *Mandamus Order*, ISP-bound traffic is subject to compensation under section 251(b)(5). Under the mirroring rule of the *ISP Remand Order*,¹¹⁷ which is still applicable and to which the parties agreed, the CLECs claim that Qwest must compensate them under the FCC rate for this traffic.

90 We determined above that: (1) the *Mandamus Order* does not change the scope of the *ISP Remand Order* and the compensation scheme it created, which only applies to calls within a local calling area; (2) that the section 251(g) exclusion still applies to ISP-bound traffic outside of a local calling area, and (3) that VNXX traffic does not originate and terminate within a local calling area. Thus, we find that the parties' interconnection agreements and amendments, which require compensation at the rates set by the FCC, are not determinative of the rate for the narrow scope of ISP-bound traffic at issue in this case. Similarly, because we have found that VNXX ISP-bound traffic is subject to the section 251(g) exclusion, the traffic is *not* subject to compensation under section 251(b)(5).

91 The Pac-West agreement includes the following terms and provisions:

- "Exchange Service" is defined as "traffic that is originated and terminated within the local calling area as defined by Qwest's then current EAS/local serving areas, and as *determined by the Commission*."¹¹⁸
- "Access Services" is defined as "the interstate and intrastate switched access and private line transport services offered for the origination and/or termination of interexchange traffic."¹¹⁹
- "Exchange Access (IntraLATA Toll)" is defined as "in accordance with Qwest's current IntraLATA toll serving areas, as determined by Qwest's state

¹¹⁶ They reiterate their assertion that the *Mandamus Order* makes clear that the rates for ISP-bound traffic established in the *ISP Remand Order* apply to *all* ISP-bound traffic.

¹¹⁷ See ¶ 23, *supra*.

¹¹⁸ March 16, 2001, Interconnection Agreement between Qwest Corporation and Pac-West, § 4.2.2, Exh. D to Smith Affidavit in Support of Qwest Memorandum (emphasis added).

¹¹⁹ *Id.* § 4.2.

and Interstate Tariffs and excludes toll provided using Switched Access purchased by an IXC.”¹²⁰

- “Where either party acts as an IntraLATA Toll provider, each Party shall bill the other the appropriate charges pursuant to its respective Tariff or Price Lists”¹²¹

92 Under these terms, it appears that VNXX traffic does not meet the definitions of Exchange Service or Access Services, but does meet the definition of IntraLATA Toll.

93 Similarly, the Level 3 agreement includes the same definitions of “Access Services,” “Exchange Service,” and “Exchange Access (IntraLATA Toll).”¹²² As with the Pac-West agreement, Level 3 and Qwest agreed that “Where either party acts as an IntraLATA Toll provider, each party shall bill the other the appropriate charges pursuant to its respective Tariff or Price Lists.”¹²³

94 The provisions of the parties’ agreements concerning ISP-bound traffic provide that “EAS/Local traffic” is compensated under the reciprocal compensation rate, while ISP-bound traffic, as described by the *ISP Remand Order*, is subject to compensation under the FCC rates.¹²⁴

95 The agreements rely on the *ISP Remand Order* to determine the scope of ISP-bound traffic subject to the FCC’s ISP-bound traffic rate. As we limit that scope in this order to ISP-bound calls within a local calling area, the VNXX traffic in question does not qualify for compensation at that rate. The terms of the agreements also limit reciprocal compensation under section 251(b)(5) to traffic within a local calling area. As the VNXX traffic in question does not qualify under the agreements as either subject to compensation under the *ISP Remand Order* or section 251(b)(5) reciprocal

¹²⁰ *Id.* § 4.22.

¹²¹ *Id.* § 7.3.1

¹²² December 13, 2002, Interconnection Agreement between Qwest Corporation and Level 3, §§ 4.2, 4.24, and 4.22 respectively, Exh. C to Smith Affidavit in Support of Qwest Memorandum.

¹²³ *Id.* § 7.3.1.

¹²⁴ May 24, 2002, ISP Bound Traffic Amendment to Interconnection Agreement between Qwest Corporation and Pac-West, §§ 1-3, Exh. D to Brotherson Affidavit in Support of Qwest Memorandum; *see also* December 13, 2002, Interconnection Agreement between Qwest Corporation and Level 3, §§ 4, 7.3.6., Exh. C to Smith Affidavit in Support of Qwest Memorandum.

compensation, the traffic must fall within a different category. In light of our findings above and our review of the terms of the parties' interconnection agreements, we interpret those agreements to require Pac-West and Level 3's VNXX ISP-bound traffic to be treated as IntraLATA Toll or Toll-like traffic, unless the parties subsequently agree to different terms.

5. How Should the Commission Determine Compensation Under the Parties' Agreements?

96 We note that Qwest has submitted detailed affidavits of Larry B. Brotherson, Philip A. Linse and Ted D. Smith with its motion for summary determination. These affidavits, among other things, address the compensation that Qwest argues that Pac West and Level 3 owe the company if the Commission adopts Qwest's interpretation of the interconnection agreements and the law. Pac-West and Level 3 dispute these facts, and Level 3 notes that the out-of-state location of its ISP modems, not yet in evidence, may result in the Commission's lack of jurisdiction. Granting a motion for summary determination is not appropriate where, as in the issue of the level of compensation, there are material facts in dispute. In light of our finding that the VNXX traffic in question is IntraLATA Toll or Toll-like traffic under the agreements, and the parties' disputes about the amount and type of traffic at issue, it is necessary to develop a full evidentiary record as to the exact location of the CLECs' ISP modems, at the time of the traffic in question in this proceeding, in order to determine which traffic is subject to our jurisdiction and should be subject to such toll rates. If no party seeks an appeal of this decision, or upon a decision on appeal, we will initiate an evidentiary proceeding to address the issue of compensation.

D. Qwest's Motion to Strike

97 After the parties filed responses to each other's motions for summary determination, Qwest filed a motion to strike portions of Pac-West's and Level 3's responses, or in the alternative, a motion for leave to file a reply, attaching a reply.

1. Qwest's Motion for Leave to File a Reply

98 Under the Commission's procedural rules, parties may not file replies to an answer to a pleading without Commission authorization.¹²⁵ Parties may attach a reply to the

¹²⁵ WAC 480-07-370(1)(d).

motion. If the Commission does not act within five business days of the filing date of the motion, the motion is deemed denied.¹²⁶

99 Qwest filed its motion for leave to file a reply on April 1, 2009. The Commission did not act on the motion within five business days. Thus, Qwest's motion to file a reply is denied. The Commission must not consider any arguments Qwest presents in its reply.

2. Qwest's Motion to Strike

100 In the alternative, Qwest filed a motion to strike portions of Pac-West's and Level 3's responses to its motions for summary determination. Pac-West and Level 3 both filed timely responses to this motion.

101 As to Pac-West's response, Qwest asserts that Pac-West raises a new issue in its discussion of Qwest's Market Expansion Line (MEL) service, a service Pac-West claims is similar to foreign exchange (FX) service and to which Qwest does not apply access charges. FX service is similar to VNXX service. Qwest argues that as it did not discuss MEL service in its motion, it is not appropriate for Pac-West to raise the issue in its answer.

102 In response, Pac-West asserts it was discussing MEL service in response to Qwest's claim that Pac-West was acting as an interexchange carrier (IXC) when providing VNXX service. Pac-West identified FX and MEL service as instances where Qwest provides a service similar to VNXX as a LEC, not an IXC. Pac-West argues that discussing MEL service should not come as a surprise to Qwest as the topic was addressed in the Commission's VNXX complaint proceeding.

103 Similarly, Qwest asserts that Level 3 raises a new claim in its response by seeking a ruling that Qwest may not impose transport charges on Level 3. Qwest argues that Level 3 never raised this issue on appeal to the District Court or in its motion for summary determination.

104 Level 3 argues that it is allowed to respond to arguments Qwest made throughout its motion and supporting memorandum, specifically that Qwest is entitled to originating charges for VNXX traffic. Level 3 asserts that Qwest opened the door to a response that such charges are precluded by federal law and under a prior Commission order.

¹²⁶ WAC 480-07-370(1)(d)(ii).

105 We deny Qwest's motion to strike. In the portion of the responses to which Qwest objects, both Pac-West and Level 3 were addressing arguments and claims Qwest had made in its memorandum supporting its motion for summary determination. Neither party raised any new issue that should be stricken from their pleading. Pac-West responded to an argument Qwest raised about FX service by providing examples of a similar Qwest service arrangement that is not subject to access charges. Similarly, Level 3 responded to repeated arguments by Qwest that it is entitled to originating charges for VNXX traffic.

III. FINDINGS OF FACT

106 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary findings of fact, incorporating by reference pertinent portions of the preceding detailed findings:

- 107 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including telecommunications companies.
- 108 (2) Qwest is engaged in the business of furnishing telecommunications services including, but not limited to, providing basic local exchange service to the public for compensation within the state of Washington.
- 109 (3) Level 3 and Pac-West, are competitive local exchange carriers within the definition of 47 U.S.C. § 153(26), providing local exchange telecommunications service to the public for compensation within the state of Washington, or are classified as competitive telecommunications companies under RCW 80.36.310-.330.
- 110 (4) The Commission approved an interconnection between Pac-West and Qwest on February 14, 2001, in Docket UT-013009, allowing Pac-West and Qwest to exchange ISP-bound traffic.

- 111 (5) The Commission approved an ISP amendment to the Pac-West and Qwest interconnection agreement, incorporating the *ISP Remand Order*, on March 12, 2003, in Docket UT-013009. The amendment provides that the parties may exchange ISP-bound traffic, as that term is used in the FCC's *ISP Remand Order*.
- 112 (6) Pac-West provides ISP-bound service to its customers using VNXX arrangements.
- 113 (7) In December 2004, Qwest began to withhold compensation to Pac-West for VNXX traffic.
- 114 (8) Pac-West filed its petition for Enforcement of Interconnection Agreement on June 9, 2005, alleging that Qwest refused to compensate Pac-West for all local and ISP-bound traffic.
- 115 (9) In its *Final Order Affirming and Clarifying Recommended Decision*, UT-053036, February 10, 2006, the Commission found that Pac-West's claimed compensation was valid under the parties' interconnection agreement, on grounds that the *ISP Remand Order* required the FCC compensation rate for all ISP-bound traffic whether that traffic was deemed local or interstate.
- 116 (10) The Commission approved an interconnection agreement between Qwest and Level 3 in March 2003 in Docket UT-023042, allowing Level 3 to exchange ISP-bound traffic with Qwest.
- 117 (11) The interconnection agreement between Level 3 and Qwest provides that the parties will exchange ISP-bound traffic, as that term is used in the FCC's *ISP Remand Order*.
- 118 (12) Level 3 filed its petition for Enforcement of Interconnection Agreement on June 21, 2005, alleging that Qwest refused to compensate Level 3 for all local and ISP-bound traffic.
- 119 (13) In its *Order Accepting Interlocutory Review; Granting, In Part and Denying, In Part, Level 3's Petition for Interlocutory Review*, Docket UT-053039, February 10, 2006, the Commission found that Qwest owed Level 3 compensation for ISP-bound VNXX traffic.

- 120 (14) As a result of Qwest's challenge of the Commission's final orders in the enforcement cases, the U.S. District Court for the Western District of Washington ordered the cases remanded to the Commission, to reinterpret the *ISP Remand Order* in light of the parties' interconnection agreements and to classify VNXX ISP-bound calls as local or interexchange.
- 121 (15) The Commission consolidated the District Court's remand of the enforcement cases, Dockets UT-053036 and UT 053039, for decision on August 27, 2008.
- 122 (16) On November 8, 2008, the FCC issued its *Mandamus Order*, clarifying the basis for its authority to regulate and establish compensation for the ISP-bound traffic addressed in the *ISP Remand Order*.
- 123 (17) The nationwide telephone numbering system was designed so that the first six digits of each ten-digit telephone number enabled telephone companies to assign a physical location to a telephone customer's specific telephone number, and telephone companies continue to use this geographic indicator to identify and separate calls into local or interexchange calls for retail billing to end users or assessing charges to another carriers.
- 124 (18) The NXX code identifies the central office and switch that an incumbent local exchange carrier will use to route a telephone call.
- 125 (19) Under Washington law, call rating, *i.e.*, whether a call is local or long distance, and subject to toll charges, is based on Commission-established geographic areas or exchanges.
- 126 (20) The geographic areas that distinguish between local and long distance calling in Qwest's service territory are defined in exchange maps in Qwest's Commission-approved tariffs.
- 127 (21) The CLECs have adopted Qwest's local calling areas in their interconnection agreements with Qwest.
- 128 (22) VNXX traffic arrangements occur when a carrier assigns a telephone number from a rate center in a local calling area different from the one where the customer is physically located.

IV. CONCLUSIONS OF LAW

- 129 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law incorporating by reference pertinent portions of the preceding detailed conclusions:
- 130 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, this proceeding. *RCW Title 80.*
- 131 (2) The Commission is designated in the Telecommunication Act of 1996 as the agency responsible for arbitrating, approving and enforcing interconnection agreements between telecommunications carriers, pursuant to sections 251 and 252 of the Act.
- 132 (3) The *ISP Remand Order* addressed only ISP-bound calls from one LEC's end user customer to an ISP within the same local calling area that is served by a competing LEC, not all ISP-bound calls or VNXX traffic.
- 133 (4) The *Mandamus Order* clarified the legal basis in the *ISP Remand Order* for the FCC's jurisdiction over ISP-bound traffic within a local calling area, and the compensation for such traffic.
- 134 (5) State commissions have authority under federal law to define local calling areas and determine appropriate compensation for intrastate interexchange traffic. *See Global NAPs I*, 444 F.3d at 62-63, 73; *Global NAPs II*, 454 F.3d at 97; *Peevey*, 462 F.3d at 1146; *Qwest*, 484 F. Supp. 2d at 1163, 1175-77.
- 135 (6) In Washington, telephone calls are classified as local or interexchange based on geographic calling areas, not on the basis of assigned telephone numbers.
- 136 (7) VNXX traffic does not originate and terminate within the same local calling area and is thus either intrastate interexchange traffic subject to Commission determined compensation and not subject to section 251(b)(5) of the Act, or interstate interexchange traffic subject to the FCC's jurisdiction.

- 137 (8) The FCC has identified regulatory arbitrage and traffic imbalances caused by CLEC reliance on ISP-bound traffic, and sought to address these issues through interim compensation measures in its *ISP Remand Order*.
- 138 (9) An interconnection agreement is a contract. The meaning of an interconnection agreement is governed by the intent of the parties as determined from reading the contract as a whole, the subject matter and objective of the contract, the circumstances of making the contract, the subsequent acts and conduct of the parties, and the reasonableness of the parties' intentions.
- 139 (10) Given our decision on the interpretation of the scope of the *ISP Remand Order* and the classification of VNXX traffic, the parties' interconnection agreements do not allow VNXX ISP-bound calls to be compensated under the rate established in the *ISP Remand Order*, but appear to require compensation as Intra-LATA Toll or Toll-like traffic.
- 140 (11) It is necessary to conduct a further evidentiary proceeding to determine the location of the ISP modems in each Qwest local calling area and to determine the volume of VNXX ISP-bound traffic subject to compensation.

V. ORDER

THE COMMISSION ORDERS:

- 141 (1) Qwest's motion for summary determination is granted as to issues of law, including the interpretation of the *ISP Remand Order*, the classification of VNXX traffic, and the interpretation of the parties' interconnection agreements.
- 142 (2) Qwest's motion for summary determination is denied to the extent it seeks resolution of the amount and nature of the traffic for which Qwest seeks compensation.
- 143 (3) Level 3's and Pac-West's motions for summary determination are denied.
- 144 (4) Qwest's motion for leave to file a reply, or in the alternative, to strike portions of Level 3's and Pac-West's responsive briefs is denied.

- 145 (5) The Commission will initiate a separate evidentiary proceeding to determine the placement of ISP modems in Qwest local calling areas and the appropriate level of retroactive compensation due to the parties pursuant to this order.

DATED at Olympia, Washington, and effective November 14, 2011.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.

EXHIBIT C

1 BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

2 DOCKET NO. 05-00484-UT

3 IN THE MATTER OF LEVEL 3 COMMUNICATIONS
4 LLC'S PETITION FOR ARBITRATION PURSUANT TO
5 SECTION 252(B) OF THE COMMUNICATIONS ACT OF
6 1934, AS AMENDED BY THE TELECOMMUNICATIONS
7 ACT OF 1996, AND THE APPLICABLE STATE LAWS
8 FOR RATES, TERMS, AND CONDITIONS OF
9 INTERCONNECTION WITH QWEST CORPORATION

7 LEVEL 3 COMMUNICATIONS, LLC,

8 Petitioner.

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TRANSCRIPT OF PROCEEDINGS
March 8, 2007
9:30 a.m.
224 East Palace Avenue
Santa Fe, New Mexico 87501

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17 PURSUANT TO THE NEW MEXICO PUBLIC REGULATION
18 COMMISSION this hearing was:

18

19

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21 TAKEN BY: ANTHONY MEDEIROS
22 HEARING EXAMINER

22

23 REPORTED BY: Betty J. Lanphere, NM CCR #70
24 Betty J. Lanphere & Associates, Inc.
25 Post Office Box 449
Santa Fe, New Mexico 87504

25

Betty J. Lanphere & Associates, Inc.
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Santa Fe, New Mexico 87504 - (505)983-7367

2 A P P E A R A N C E S

3 FOR THE COMMISSION:

4

5 ANTHONY MEDEIROS, HEARING EXAMINER
6 DAVID GABLE (Commission Technical Advisor) (via
telephone)

7 FOR COMMISSION STAFF:

8 MICHAEL RIPPERGER, Staff
9 NANCY BURNS, ESQ.
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11 FOR LEVEL 3 COMMUNICATIONS, LLC:

12 MACK GREENE
13 RICHARD E. THAYER
KEN WILSON
14 PETER J. GOULD, ESQ.
VICTORIA MANDELL, ESQ.

15 FOR QWEST COMMUNICATIONS:

16 TED SMITH, ESQ.
17 PHILIP A. LINSE
LARRY BROTHERRSON
18 WILLIAM EASTON
PHILIP A. LINSE

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I N D E X

Page

9 how the shape came out, but it would be accurate to
10 display it the way you're describing it as well.

11

12 MR. LINSE: Okay. And then also in
13 the Minnesota conference we also talked about the Level
14 3 router and the connection to the Internet router and
15 that cloud at the upper portion of the drawing, that
16 too could also be a Level 3 provided facility.

17

18 MR. GREENE: Correct.

19

20 MR. LINSE: And then likewise if
21 you move to MDG the New Mexico Technical Conference
22 Exhibit 3, those connections would be fairly
23 represented by a connection between the media gateway
24 with the exception of maybe some routers and other type
25 of transport type equipment, connections to, directly

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□

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1 to from the media gateway to like the AOL or to other
2 voIP services providers or to other radio servers and
3 to the Internet?

4

5 MR. GREENE: Correct. We really
6 have two kind of classifications of how we serve ISP
7 customers. One is the AOL example that you were just
8 going through where AOL asked that we hand all the
9 traffic to them, and then if that particular user wants
10 to get to an AOL server they go straight from there to
11 AOL, but if they want to get out to the Internet at

12 large, they are going through AOL's network to get to
13 the Internet at large, where with our other ISP
14 customers they have outsourced everything to Level 3,
15 so not only are we providing a dial-up connectivity but
16 through everything we actually put the traffic out on
17 the Internet at large through without it having touched
18 the ISP's network. They are just simply providing the
19 mail servers, the password servers and perhaps some
20 unique -- they may have but we send that traffic
21 directly out onto the Internet.

22

23 MR. LINSE: And then are there any
24 of those customers located within New Mexico?

25

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1 MR. GREENE: I don't believe that
2 they are. In addition to serving the large ISP's, we
3 also serve what is referred to as ISP aggregators.
4 There has been this belief that has been out there that
5 the Internet started, you know, with a bunch of mom and
6 pops that had their modem banks all locally. My
7 recollection of the history of the Internet is that it
8 started with companies like CompuServe and AOL that all
9 had their Internet servers located centrally.

10 And even today these aggregators support
11 rural telephone companies, so as a rural telephone
12 company may offer up its Internet service. The
13 underlying provider may be Level 3. We haven't done an