BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF LEVEL 3 COMMUNICATIONS, LLC'S PETITION FOR ENFORCEMENT OF INTERCONNECTION AGREEMENT WITH QWEST CORPORATION	Docket No. UT-053039 QWEST'S PETITION FOR RECONSIDERATION OF THE COMMISSION'S FINAL ORDER

I. INTRODUCTION

1 Pursuant to RCW 34.05.470 and WAC 480-07-850 Qwest Corporation ("Qwest") hereby petitions the Commission for reconsideration of its Final Order No. 05 in this matter, entered February 10, 2006. Qwest asks the Commission to reconsider two aspects of its Final Order. First, Qwest believes that the Commission erred as a matter of law in its reading and interpretation of the two controlling decisions – the FCC's *ISP Remand Order*[1] and the D.C. Circuit Court's decision reversing that order.[2] As a result, the Commission reached an incorrect conclusion with regard to whether VNXX traffic is included within the term "ISP-bound traffic" as that term is used in the *ISP Remand Order*. Second, Qwest asks the

[1] *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9163-81 ¶¶ 23-65, 9186-90, ¶¶ 77-84 (2001), *remanded sub nom* ("*ISP Remand Order*").

[2] *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *reh'g, en banc, denied* (D.C. Cir. Sept. 24, 2002), *cert. denied*, 538 U.S. 1012 (May 5, 2003) ("*Worldcom*").

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Commission to reconsider its decision on the issue of the effective date of the interconnection agreement amendment implementing this order.

II. DISCUSSION

A. The Commission Should Reconsider its Order with Regard to the Compensability of VNXX Traffic

2 Qwest asks the Commission to reconsider its Final Order with regard to the issue of the compensability of VNXX traffic. This issue is the central issue in this case, and despite having been addressed numerous times by the FCC and various courts, the one thing that remains clear is that the issue is not clear. Qwest believes that in spite of (or perhaps because of) the many pages of briefing devoted to this issue, the fundamental holdings of the only two relevant decisions somewhat understandably may have been overlooked. It appears from various passages in the Final Order that the Commission has erred in interpreting those two decisions, and Qwest respectfully asks the Commission to reconsider its decision in light of this additional explanation, and correct that erroneous interpretation.

3 The Final Order relies on a review of a number of decisions in support of its conclusions. *Final Order at ¶ 24.* However, the only two decisions that are controlling are the *ISP Remand Order* itself, and the D.C. Circuit Court's reversal of that order.

4 First, the Commission's Final Order fails to recognize the critically important discussion in paragraph 39 of the *ISP Remand Order.* This paragraph states with absolute clarity that the FCC is not impacting the pre-existing access charge regime that applied "to the access services that incumbent LECs provide . . . to connect subscribers with ISPs for Internet-bound traffic." Indeed, all parties to this proceeding agree that there are certain calls destined to ISPs to which access charges should and do apply. The FCC did not alter this model. The FCC stated: "Accordingly, unless and until the Commission by regulation should determine otherwise, Congress preserved the pre-Act regulatory treatment of *all access services* enumerated under

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section 251(g). These services thus remain subject to Commission jurisdiction under section 201 (or, to the extent they are intrastate services, they remain subject to the jurisdiction of state commissions). This analysis properly applies to the access services that incumbent LECs provide (either individually or jointly with other local carriers) to connect subscribers with ISPs for Internet-bound traffic." (Emphasis added).

5 By ignoring paragraph 39 of the *ISP Remand Order*, the Commission misreads that order in a number of important respects. In paragraph 25 of the Final Order, the Commission stated that according to the FCC's compensation scheme, "it is irrelevant for purposes of determining compensation whether the traffic is local, toll, or via VNXX arrangements." However, this is clearly wrong because Section 251(g) of the Act preserved the pre-Act regulatory treatment (i.e., access charges) that applied to intrastate long distance calls made to ISPs to access the Internet.

6 Paragraph 28 of the Final Order states, in support of the Commission's conclusions, that "the FCC further held that 'the definition does not require that the transmission, once handed over to the information service provider, terminate within the same exchange area in which the information service provider first received the access traffic.'"[3] This is true, but it supports the opposite conclusion than the one reached by the Commission. What the FCC is saying here is that *after* the traffic gets to the ISP, it does not matter where it goes from there. This sentence *supports* Qwest's position – that the traffic must first get to the ISP in the same local calling area in which it originated. On the other hand, if the call travels from a caller in one local calling area to an ISP located in another local calling area, it is a long distance call subject to intrastate access charges.

7 Furthermore, the *ISP Remand Order's* references to the caller and the ISP being located in the

[3] *ISP Remand Order,* n.82.

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"same local calling area" cannot be ignored. The FCC first observed that "an ISP's end-user customers typically access the Internet through an ISP server located in the same local calling area."[4] Then, in describing the question it was facing in that very proceeding, the FCC stated that "the question arose 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 a competing LEC."[5] Finally, the FCC notes that the network model that it has in mind in making its decision is one in which "Internet communications originate with the ISP's end-user customer and continue beyond the *local ISP server* to websites or other servers . . .."[6] All of these passages, which cannot be said to be dicta or irrelevant, frame the issue that the FCC is deciding. And that issue is clearly limited to traffic that terminates to an ISP server located in the same local calling area as the calling party. The Commission's contrary interpretation is erroneous as a matter of law.

8 The other authority is of course the D.C. Circuit Court of Appeals, in its review of the *ISP Remand Order*. The critical passage from this court – the Hobbs Act reviewing court of the *ISP Remand Order* – clearly stated that in the *ISP Remand Order* the FCC held "that under § 251(g) of the Act it was authorized to 'carve out' from § 251(b)(5) calls made to internet service providers ('ISPs') *located within the caller's local calling area.*"[7] Thus, it is beyond any reasonable dispute, and is stated by the only controlling federal court, that the FCC's holding was limited to those calls where the ISP and the calling party are in the same local calling area. Any court or state commission that concludes that the *ISP Remand Order* governs all ISP traffic is substituting its judgment for that of the D. C. Circuit, the court under federal law with the authority to render a definitive interpretation of the *ISP Remand Order*.

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4 *ISP Remand Order* at ¶10

5 *Id at* ¶ 13

6 *Id at* ¶ 14

7 288 F.3d at 430 (emphasis added).

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9 Thus, because the Commission erred in interpreting these orders as a matter of law, the Commission should reconsider its order and reverse its decision on this issue.

B. The Commission should Reconsider its Final Order with Regard to the Effective Date of Compensation under the *Core* Order.

10 Qwest asks the Commission to reconsider its Final Order with regard to the issue of the effective date of compensation under the *Core*[8] order. The appropriate effective date, in accordance with the terms of the parties' ICA, is the date the Commission approves the amendment to the ICA. Alternatively, consistent with prior Commission orders on this topic, the effective date should be no earlier than the date that Level 3 made the request to amend its agreement.

11 The Commission has misinterpreted the effective date of the *Core* order, essentially holding that it overrides the change in law process of the interconnection agreements. However, there is nothing to suggest that the FCC intended that this order be effective without further action, or that this order would be anything other than a change of law that would be implemented through the normal change of law process in the interconnection agreements.[9] Level 3's request for an amendment to its ICA to implement this change in law indicates that Level 3 agrees that the change was not self-implementing.

12 Qwest recognizes that the Commission has a concern about the potential for one party to have an incentive to unnecessarily delay implementation. However, that concern has already been addressed in the parties' interconnection agreement, which contains a process to ensure that a

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[8] *Petition of Core Communications for Forbearance under 47 USC § 160(c) from the Application of the ISP Remand Order*, Order FCC 04-241, WC Docket No. 03-171 (rel. October 18, 2004) ("*Core*").

[9] As the Commission discussed in ¶ 50 of the Final Order, in the *Triennial Review Remand Order*, the FCC did spell out a process which would occur regardless of whether entities placed it into their interconnection agreements. However, that process specifically encompassed the change of law process, as the FCC stated that the transition periods were put in place to specifically permit carriers, "to modify their interconnection agreements, including completing any change of law processes." ¶ 143 of the *Triennial Review Remand Order*. The *Core* order has no similar provisions, and there is no language in that order on which to base a conclusion that it is self-implementing or effective for a particular carrier prior to an amendment to an interconnection agreement.

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party could not unduly delay in implementing a change in law.[10] Thus, Level 3 possessed the ability to implement the dispute resolution processes in December of 2004, but did not choose to do so. The Commission should not reward a party for creating unnecessary delay, but, nor should the Commission create remedies that reward Level 3 for its lack of action.

13 If the Commission determines that an earlier effective date appropriate in order to address concerns about one party having an incentive to delay the negotiations process, the earliest effective date should be the date Level 3 requested a *Core* amendment, December 13, 2004. The Commission has previously decided that an appropriate effective date for an amendment is the *request* date, not the date of an order that served as the trigger for change.[11] Thus, in accordance with prior Commission orders, and to create appropriate incentives for both parties, the Commission should order an effective date no earlier than Level 3's request for an amendment.

III. CONCLUSION

14 For the reasons stated herein, Qwest respectfully asks the Commission to reconsider its Final Order and enter an order on reconsideration that concludes, consistent with the *ISP Remand Order* and the *WorldCom* decision, that VNXX traffic is excluded from the term "ISP-bound traffic" as that term is used in the *ISP Remand Order*. The Commission should further order that the amendment to the parties' interconnection agreement that is necessary to implement this decision is effective on the date the amendment is approved, or in any case no earlier than the date on which Level 3 first requested that amendment.

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[10] Section 2.2 of the interconnection agreement delineates the amendment process for a change in law and states, "[W]here the Parties fail to agree upon such an amendment within sixty (60) days from the effective date of the modification or change of the Existing Rules, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement."

[11] *See*, *Eschelon v. Qwest,* Docket No UT-033039, Order No. 04, ¶ 45. In *Eschelon*, the Commission held that the proper effective date for an amendment was the date on which the requesting carrier made its first valid opt in request. This situation is sufficiently similar to be guided by the rationale and outcome of that decision.

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DATED this 21th day of February, 2006.

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