[Service Date: March 3, 2006]

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 LEVEL 3 COMMUNICATIONS, LLC'S RESPONSE TO QWEST CORPORATION'S PETITION FOR RECONSIDERATION

I. INTRODUCTION

1. The Commission has made an educated and well reasoned ruling that is based on the law. That ruling should stand. This matter has been in dispute since 2004 and this is merely another attempt by Qwest to delay or avoid its obligations to compensate Level 3 for the use of its network. The Commission should reject Qwest's most recent attempt to avoid its legal obligations by rejecting Qwest's Petition and reaffirming the *Final Order*.

II. ARGUMENT

A. The Commission's Analysis of the *ISP Remand Order* and the DC Circuit Court's Decision in Worldcom is Correct and Qwest's Opposition to the *Final Order* is Unfounded.

2. Qwest argues that the Commission misinterpreted the *ISP Remand Order* and *Worldcom.*[1] However, rather than providing any accurate authority for that proposition – Qwest

[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001), ("ISP

merely reiterates its VNXX arguments, which the Commission has correctly deemed to be a red herring In its attempt to argue that VNXX is access traffic, Qwest fails to recognize two important factors.

3. First, Qwest misunderstands the intent and effect of paragraph 39 of the *ISP Remand Order*. Qwest uses Paragraph 39 to argue that the FCC intended to apply the old regime of access regulation to ISP-bound traffic; however, this paragraph is merely a historical discussion of regulation. In fact, three paragraphs later the FCC states that "the next step in our inquiry is to determine whether ISP-bound traffic falls within one or more of the categories specified in section 251(g)" to which they concluded only "that this traffic, at a minimum, falls under the rubric of 'information access.'"[2] Thus, the FCC clearly did not intend in Paragraph 39 to mandate the application of exchange access rates to ISP-bound traffic. Not only is Qwest's argument a mischaracterization of the *ISP Remand Order*, but it is not relevant. As the Commission recognized, "the FCC creates a separate compensation category for ISP-bound traffic . . . and it is *irrelevant* whether the traffic is local, toll, or via VNXX arrangement."[3]

4. Second, Qwest's attempt to characterize VNXX traffic as exchange access fails to recognize the routing differences between locally-dialed ISP-bound traffic and long distance traffic. Access traffic involves a call originated by an Interexchange Carrier's customer on the network of one Local Exchange Carrier and handed off to the Interexchange Carrier who then carries that call to another Local Exchange Carrier for eventual termination. The call flow at issue in this case involves two Local Exchange Carriers directly exchanging locally dialed calls at an established Point of Interconnection within a LATA. These are two very different call flows, using different equipment, and being controlled by very different policy considerations. The D.C. Circuit eloquently summarized this point in its discussion of the FCC's use of 251(g)

Remand Order"*) remanded*, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert.den.* 538 U.S. 1012 (2003) ("Worldcom").

[2] ISP Remand Order at ¶ 42.

[3] Order Accepting Interlocutory Review; Granting, in part, and Denying, in part, Level 3's Petition for Interlocutory Review, Washington State Utilities and Transportation Commission, Docket No. UT-053039, Order No. 5, ¶ 25 (Feb. 10, 2006) (*emphasis added*). Hereafter referred to as "Final Order."

for ISP-bound traffic by stating that "LEC's services to other LECs, even if en route to an ISP, are not 'to' either an IXC or to an ISP."[4] Thus, locally dialed and exchanged ISP-bound traffic is clearly not exchange access traffic. Moreover, as the FCC pointed out, the *ISP Remand* Order only affects compensation for ISP-bound traffic and all other local interconnection obligations remain the same.[5]

B. The Commission's Decision in Regard to the Effective Date of Compensation under the *Core Forbearance Order* was Correct and Qwest's Attempt to Push Back the Effective Date is Another Attempt by Qwest to Delay or Avoid its Obligations.

5. On October 8, 2004 the FCC adopted its *Core Forbearance Order*. In the *Core Forbearance Order*, the FCC provided that "[c]onsistent with section 10 of the Act and our rules, the [FCC's] forbearance decision shall be effective on Friday, October 8, 2004."[6] In its *Final Order*, this Commission intended to "implement[] the FCC's intent that the *Core Forbearance Order* apply to all carriers on the effective date of the order."[7] In "implementing" the FCC's intent, the Commission noted that in the *Core Forbearance Order* there was "no discussion" of "requiring carriers to implement the decision under change of law provisions in parties' interconnection agreements."[8] Level 3 argued, and the Commission agreed, that the *Core Forbearance Orde*r became effective for all parties on October 8, 2004.[9]

6. Qwest has petitioned the Commission to reconsider its *Final Order* "with [r]egard to the [e]ffective [d]ate of [c]ompensation under the *Core* Order**.**"[10] Qwest presents several arguments in support of its Petition on this issue. However, none of its arguments effectively challenge the logic used by the Commission in the *Final Order* and Qwest simply ignores the portion of the *Core Forbearance Order*, discussed above, from which the Commission derived its holding.[11] More specifically, the Commission has held that the effective date of the *Core*

[4] Worldcom at 434.
[5] ISP Remand Order at fn 149.
[6] *See* 47 U.S.C. 160; *Core Forbearance Order*, ¶ 28.
[7] Final Order ¶ 52 .
[8] *Id.*
[9] Final Order, ¶ 53 .
[10] *Id.*
[11] *See* Qwest's Petition for Reconsideration of the Commission's Final Order, Docket No. UT-053039, ¶ 10-13. Hereafter referred to as "Petition." *See also* Final Order ¶ 51-53.

Forbearance Order was the date that the FCC intended and not on the date that Level 3 gave notice to Qwest of the change in law or on the date that the dispute was resolved.[12] The Commission's holding correctly finds, contrary to Qwest's argument, that the change in law effectuated by the *Core Forbearance Order* superseded contractual dispute resolution procedures.[13] Below, Level 3 addresses two specific assertions Qwest has proffered in order to resurrect its failed arguments.

7. First, Qwest attempts to use the Commission's holding in *Eschelon*[14] in support of the misleading assertion "that an appropriate effective date for an amendment is the *request* date."[15] The dispute in *Eschelon* arose out of a CLECs desire to modify its interconnection agreement by opting into the pricing terms of another more favorable agreement.[16] *Eschelon* is readily distinguishable from the dispute at issue here. *Eschelon* concerned the sufficiency of a parties' exercise of an available right under the Act that would allow it to change a term of an interconnection agreement in conformity with another agreement. On the other hand, the issue here concerns the effect of an FCC Order that directly amends the terms of an interconnection agreement and does so without any limitation.[17] The Commission recognized in its *Final Order* that while some situations,[18] such as the one in *Eschelon*, mandate that an amendment would become effective only after execution and filing,a change in law effectuated immediately by the FCC is clearly distinguishable.[19] Thus, Qwest's use of *Eschelon* is neither convincing nor relevant.

8. Second, Qwest asserts that the Commission's *Final Order* "reward[s] Level 3 for its lack of action."[20] This assertion is without foundation. In attempting to make this point,

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[12] *Id*.
[13] *Cf. Id; see also* Petition ¶ 10-13.
[14] *See* Petition ¶ 13.*citing Eschelon v. Qwest*, Docket No UT-033039, Order No. 04, ¶ 45 (2004).
[15] *Id.* at ¶ 13.
[16] *Id.* at ¶ 18.
[17] As mentioned above, the Commission noted that in implementing the FCC's intent that, in the Forbearance Order, there was "no discussion" of "requiring carriers to implement the decision under change of law provisions in parties' interconnection agreements." Final Order, ¶ 51-53.
[18] *Id.* at ¶ 50.
[19] *Id*. at ¶ 51-53.
[20] Petition ¶ 12.

Qwest ignores the fact that Level 3 began billing Qwest for the additional intercarrier compensation due under the *Core Forbearance Order* for all applicable billing periods following the effective date of the *Core Forbearance Order*, in order to perfect and maintain its claim.[21] Thus, Level 3 *acted* in conformity with the FCC's mandate that the *Core Forbearance Order* was effective immediately. Moreover, Level 3 followed the dispute resolution provisions within the Parties interconnection agreement, and for Qwest to argue that by doing so Level 3 somehow lost the claim to payment for a certain time period is preposterous.[22]

9. Furthermore, acceptance of Qwest's position would constitute poor public policy. Qwest's position would encourage a party for whom the law has changed in a disadvantageous way to delay the effect of that change by dragging its feet in the negotiation process, only to ultimately refuse at the last possible moment to enter into a negotiated amendment. In other words, a ruling in favor of Qwest's position would give incentives to all LECs negatively affected by a change in law, to use any means at their disposal to delay negotiations and ultimately force such matters to litigation. The broader effect of such behavior would be to frustrate the legitimate goals of regulators in promoting competition by imposing on all carriers an unnecessary degree of uncertainty and the disproportionate added cost of delay and litigation.

10. The Commission has recognized this concern, holding that allowing Qwest to escape its obligations for the period the Parties' were involved in dispute resolution proceedings would "[create] an incentive for ILECs to delay implementing amendments to their interconnection agreements."[23] The Commission's policy concern is an instance of a long standing concern for the industry as a whole. Former FCC Chair, Reed Hundt, observed with frustration that the ILECs had systematically used litigation as a means to "create years of…

[21] Final Order ¶ 47.
[22] *See infra below* discussing how Qwest's position disincentivizes settlement interconnecting parties whose agreements are affected by a change in law.
[23] *Id.* at ¶53.

delay" that effectively "bolster[ed] their monopolies,"[24] thereby frustrating the very purpose of the Act.[25]

11. Accordingly, the Commission should deny Qwest's Petition on the issue of the effective date of the change in law in accordance with the Commission's *Final Order*.

III. CONCLUSION

12. For the above mentioned reasons and those discussed in Level 3's other pleadings in this matter, Level 3 respectfully requests that the Commission deny Qwest's Petition for Reconsideration.

Respectfully submitted this 3rd day of March, 2006.

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[24] *Id.*

[25] Bill Pietrucha, Hundt Calls Internet the Key to Competition, Newsbytes News Network (Aug. 28, 1997); *cited in* Rebecca Beynon, THE FCC'S IMPLEMENTATION OF THE 1996 ACT: AGENCY LITIGATION STRATEGIES AND DELAY, 53 Fed. Comm. L.J. 27, 39 (2000).